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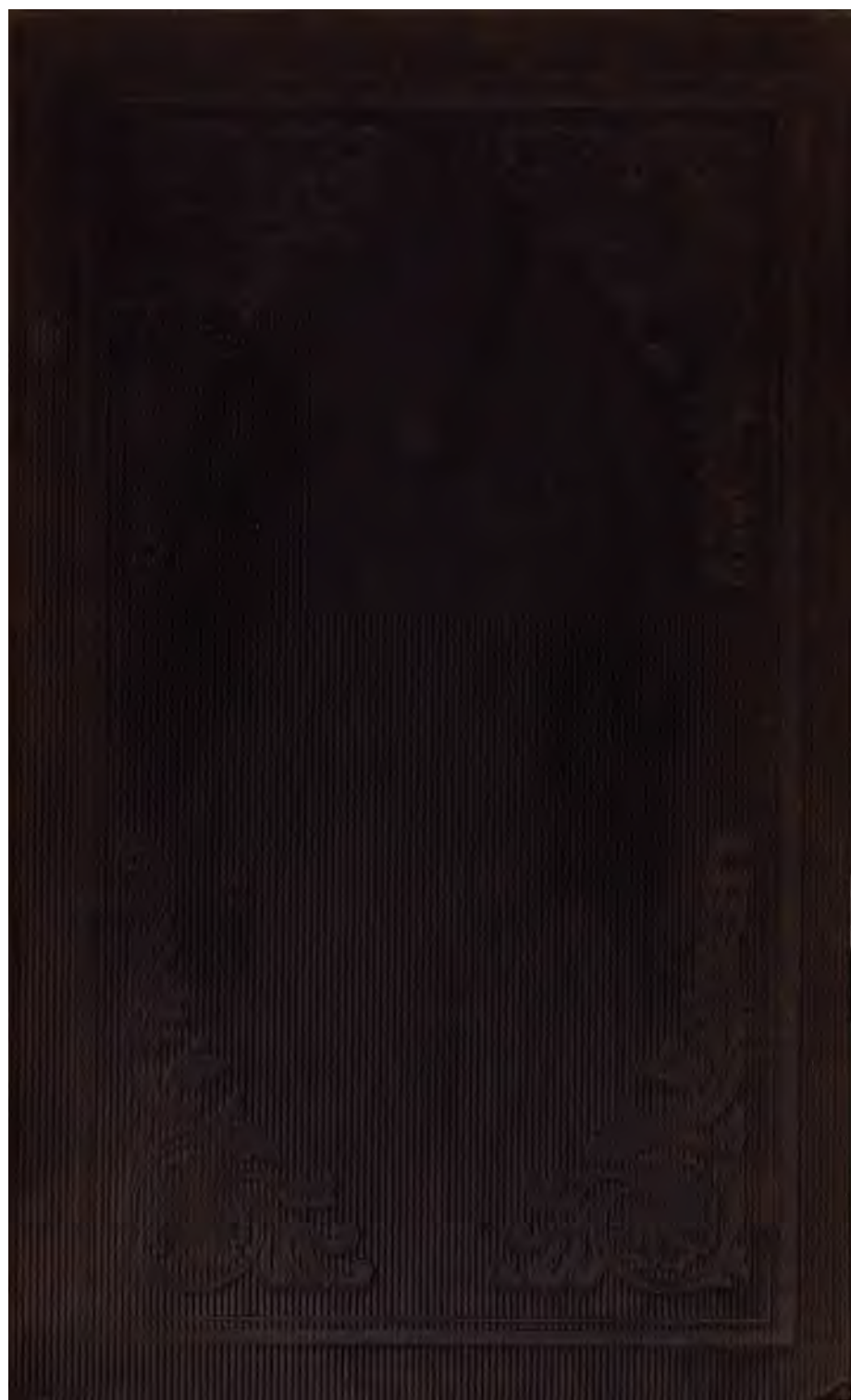
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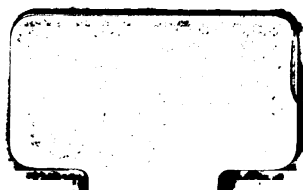
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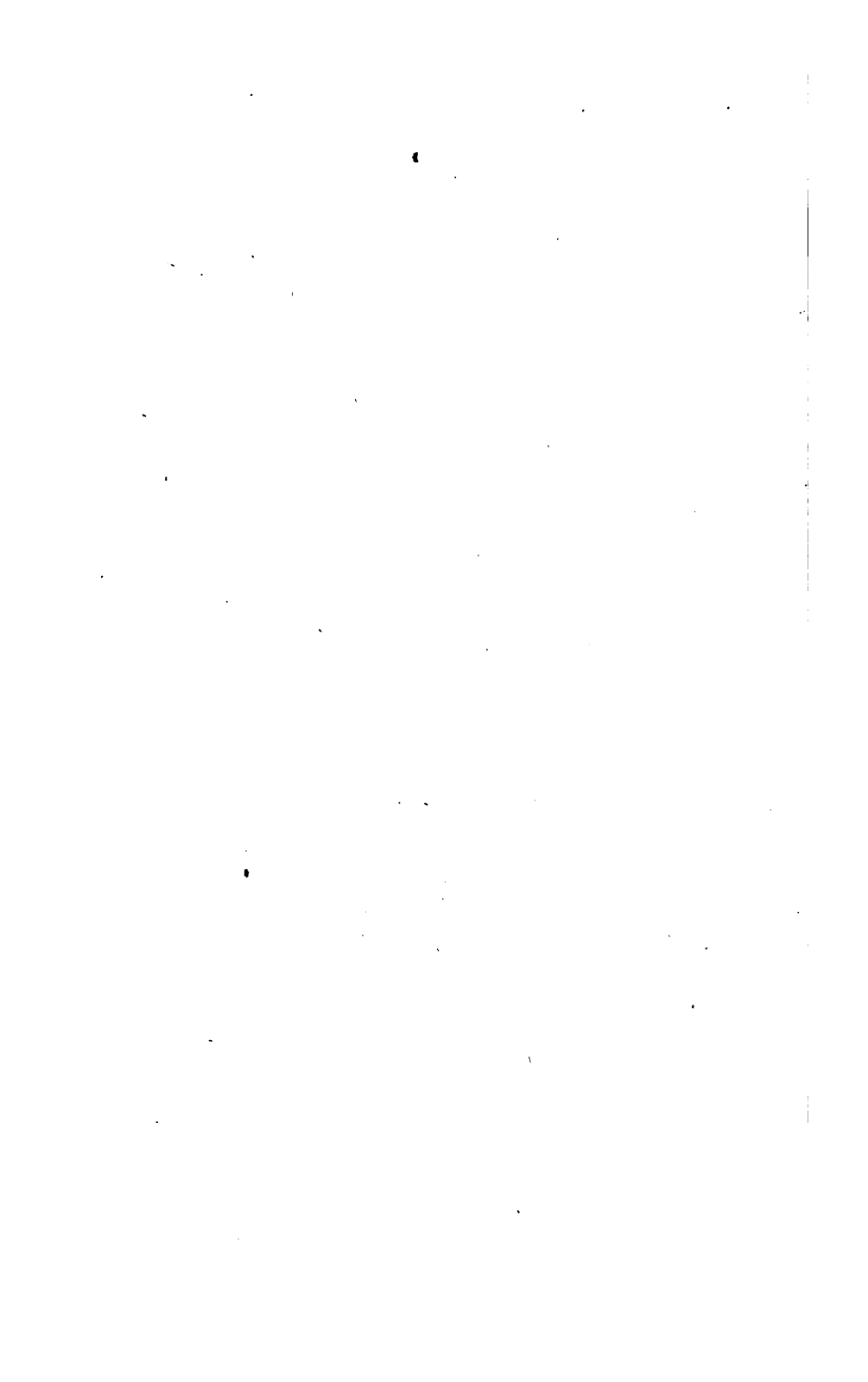
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**T H E O R Y**  
**O F L E G I S L A T I O N ;**

**B Y**

**J E R E M Y B E N T H A M .**

**TRANSLATED FROM THE FRENCH OF ETIENNE DUMONT,**

**B Y R . H I L D R E T H ,**

Author of "Banks, Banking, and Paper Currencies," "Despotism in America,"  
"Archy Moore," &c.

---

**V O L . I .**

**PRINCIPLES OF LEGISLATION.**  
**PRINCIPLES OF THE CIVIL CODE.**

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**B O S T O N :**  
**W E E K S , J O R D A N , & C O M P A N Y ,**  
**N O . 1 2 1 W A S H I N G T O N S T R E E T .**  
**1 8 4 0 .**



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## TRANSLATOR'S PREFACE.

WHATEVER may be thought of the *Principle of Utility* when considered as the foundation of morals, no one now-a-days will undertake to deny that it is the only safe rule of legislation.

To establish and illustrate this proposition, and to show how it ought to be, and might be carried into practice, was the aim and end of Bentham's life and writings.

Bacon derives his fame from the fact, that he was the first who fully appreciated, and formally laid down the proposition, now familiar to every body, that experiment and observation are the only solid basis of the physical sciences. In the moral sciences, and especially in legislation, the principle of utility is the only certain guide; and in the estimation of an impartial posterity, Bentham will rank with Bacon, as an original genius of the first order.

Already, upon the continent of Europe, his writings have attained the highest reputation. In England and America, though frequently spoken of, they are little read; though they are often criticised, or sneered at, by persons who have never seen them, and who are totally ignorant of their contents. This circumstance is easily explained. Bentham was born and bred in England, and spent all his life there; but his works, in any compact and collected form, exist only in French. He published many treatises in English, but for the generality of readers they have very few attractions. He was not skilful in the art of composition; he did not possess the gift of eloquence. Though

endowed with a great genius for investigation, he lacked the talent of communicating his ideas. During a long life, devoted solely and assiduously to the study of jurisprudence, besides his occasional publications, he produced an immense mass of manuscripts, containing a fund of most valuable ideas, but unshaped, unarranged, and in a state quite unfit for publication. Fortunately for the cause of science, these materials were not left to perish; an interpreter, a compiler, a spokesman was found, every way worthy of the task he assumed.

Dumont, a citizen of Geneva, whom political troubles had driven from his own country, after a residence of some years at St. Petersburg, where he gained a high reputation as a preacher of the Reformed church, came to London under the patronage of the Lansdowne family, and there made Bentham's acquaintance. He became his friend and disciple; was permitted to examine and to study his manuscript treatises; and having discovered the value of this hidden treasure, he solicited the task of arranging, condensing, filling out, compiling, and translating into the French language.

But Dumont's relation to the writings of Bentham will best be explained in his own words. "If, in laboring upon these manuscripts," he says,\* "I had been able to confine myself to a mere translation, I should be more tranquil as to my success; but I am not in a position so fit to inspire me with confidence. I owe it to the public not to conceal my share in this compilation; I owe it to the author to declare, that he only yielded to the solicitations of friendship, and that he often unwillingly gave up to me works unfinished, and sometimes, materials unformed.

"In giving a general idea of my part in this undertaking, I begin with a declaration which ought to shield me from undeserved blame, as well as from the distress of unmerited praise. I declare that I have no share, no claim of association, in the com-

\* Preliminary Discourse to the first edition of the *Treatise on Legislation*.

position of these works. They belong entirely to the author, and to him alone. The more I esteem them, the more desirous am I to disavow an honor, which would be an usurpation as contrary to the faith of friendship, as it is repugnant to my personal character. This declaration, which I owe to myself, would, I know, be superfluous if all readers were philosophers. Such will themselves discover, amid all the diversity of these writings, the impress of one mind, a unity of plan, an original genius, as analytic and profound in the general design, as in the execution of the parts.

"My labor, subaltern in its kind, has been limited to details. It was necessary to make a choice among various observations upon the same subject; to suppress repetitions; to throw light upon obscurities; to bring together all that appertained to the same subject; and to fill up those gaps which in the hurry of composition the author had left. I have had more to retrench than to add; more to abridge than to expand. The mass of manuscripts, put into my hands, was considerable. I have had much to do in attaining correctness, and preserving uniformity of style; little or nothing as respects the fundamental ideas. A profusion of riches left me only the care of economy. As manager of this great fortune, I have spared no pains to realize it, and put it into circulation.

"The changes I have made, have varied with the manuscripts. When I have found many treatises relative to the same subject, but composed at different times and with different views, it has been necessary to reconcile them, and to incorporate them together, so as to form a perfect whole. The author perhaps had thrown aside some occasional composition, which now would not be interesting, nor even intelligible. Unwilling that the whole should perish, I have stripped it, like an abandoned house, of every thing worth preserving. When he has delivered himself up to abstractions too profound, to metaphysics, I do not say too subtle, but too dry, I have endeavored to give more development to his ideas, to illustrate them by applications, by

facts, by examples; and I have allowed myself to scatter, with discretion, some ornaments. I have been obliged to write out some entire chapters, but always after hints and notes of the author; and the difficulty of the task would have sufficed to bring me back to a modest estimation of myself, if at any time I had been exposed to the temptation of thinking otherwise.

"The author's *Introduction to the Principles of Morals and Legislation*, regarded by a small number of enlightened judges as one of those original productions which form an epoch and a revolution in science, in spite of its philosophical merit, and perhaps on account of that merit, produced no sensation, and remained almost unknown to the public,—though in England, more than elsewhere, a useful book may come into notice, though it does not happen to be easy and agreeable. In using many chapters of that work to form the *General Principles of Legislation*, I have endeavored to avoid what prevented its success,—forms too scientific, subdivisions too much multiplied, analysis too abstract. I have translated not the words, but the ideas; I have sometimes made an abridgment, and at others a commentary. I have been guided by the advice and the hints of the author, contained in a preface, written many years after the work itself; and I have found among his papers all the additions of any consequence.

"Upon considering how much this enterprise, which I thought to confine to two or three volumes, has extended by degrees, and what a vast career I have run through,\* I regret that the labor had not fallen into abler hands; yet I am encouraged to applaud my perseverance, convinced, as I am, that otherwise these manuscripts would for a long time have remained buried in their own bulk, and that the author, always rushing forward, would never have found the leisure, nor the courage, to give himself up to the ungrateful labor of a general revision.

"This ardor to produce, and this indifference to publication;

\* This refers to other works of Bentham, announced by Dumont, as ready for publication.

this perseverance in the severest labors, and this disposition to abandon his work at the moment of completion, present a singularity which needs to be explained.

"As soon as Bentham had discovered the great divisions, the great classifications of laws, he embraced legislation as a whole, and formed the vast project of treating it in all its parts. He considered it not as composed of detached works, but as forming a single work. He had before his eyes the general chart of the science, and after that model, he framed particular charts of all its departments. Hence it follows, that the most striking peculiarity of his writings, is their perfect correspondence. I have found the earlier ones full of references to works which were merely projected, but of which the divisions, the forms, the principal ideas, existed already in separate tables. It is thus that, having subjected all his materials to a general plan, each branch of legislation occupies its appropriate place, and none is to be found under two divisions. This order necessarily supposes an author who has, for a long time, considered his subject in all its relations; who masters the whole of it; and who is not influenced by a puerile impatience for renown.

"I have seen him suspend a work almost finished, and compose a new one, only to assure himself of the truth of a single proposition, which seemed to be doubtful. A problem in finance has carried him through the whole of political economy. Some questions of procedure obliged him to interrupt his principal work till he had treated of judicial organization. This preparatory labor, this labor in the mines, is immense. No one can form an idea of it, except by seeing the manuscripts, the catalogues, the synoptical tables, in which it is contained.

"But I am not writing a panegyric. It must be confessed that the care of arrangement and correction has few attractions for the genius of Bentham. While pushed on by a creative force, he feels only the pleasure of composition; when it becomes necessary to shape, to put in order, to finish, he experiences nothing but fatigue. If a work is interrupted, the evil becomes



irreparable; the charm vanishes; disgust succeeds; and passion once quenched, can only be rekindled by a new object.

"This same turn of mind has prevented him from taking any part in the compilations which I now present to the public. It was rarely that I was able to obtain any explanations, or even that aid of which I was absolutely in need. It cost him too much to suspend the actual course of his ideas, and to return again upon old tracks.

"But it is perhaps to this kind of difficulty that I owe my perseverance. If it had been my business only to translate, I should soon have grown wearied of a task so uniform yet so difficult; while the labor of a free compilation, flatters by a kind of illusion, which lasts as long as it is useful, and vanishes when the work is done."

Among Dumont's first publications from the manuscripts of Bentham, was the treatise of which these volumes contain a translation. He afterwards brought out several other works, compiled in the same way, and from the same sources; and it is only in these compilations that we find any thing like a clear and complete development of the ideas of Bentham, or a full exposition of his system of legislation.

Public attention in America is every day more and more attracted to the subject of Legal Reform; and the translator flatters himself that he will have performed a useful and acceptable service, in restoring to its native English tongue, the following treatise.

It includes a vast field, never before surveyed upon any regular plan, and least of all according to such principles as Bentham has laid down. In the application of those principles, he has doubtless made some mistakes; for mistakes are of necessity incident to a first attempt. But he has himself furnished us with the means of detecting those mistakes and of correcting them. He asks us to receive nothing on his mere authority. He subjects every thing to the test of *General Utility*.

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# PRINCIPLES OF LEGISLATION.

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## CHAPTER I.

### *The principle of Utility.*

THE PUBLIC GOOD ought to be the object of the legislator; GENERAL UTILITY ought to be the foundation of his reasonings. To know the true good of the community is what constitutes the science of legislation; the art consists in finding the means to realize that good.

The principle of *utility*, vaguely announced, is seldom contradicted; it is even looked upon as a sort of commonplace in politics and morals. But this almost universal assent is only apparent. The same ideas are not attached to this principle; the same value is not given to it; no uniform and logical manner of reasoning results from it.

To give it all the efficacy which it ought to have, that is, to make it the foundation of a system of reasonings, three conditions are necessary.

First,—to attach clear and precise ideas to the word *utility*, exactly the same with all who employ it.

Second,—to establish the unity and the sovereignty of this principle, by rigorously excluding every other. It is nothing to subscribe to it in general; it must be admitted without any exception.

Third,—to find the processes of a moral arithmetic by which uniform results may be arrived at.

The causes of dissent from the doctrine of utility may all be referred to two false principles, which exercise an influence, sometimes open and sometimes secret, upon the judgments of men. If these can be pointed out and excluded, the true principle will remain in purity and strength.

These three principles are like three roads which often cross each other, but of which only one leads to the wished-for destination. The traveller turns often from one into another, and loses in these wanderings more than half his time and strength. The true route is however the easiest; it has mile-stones which cannot be shifted, it has inscriptions, in a universal language, which cannot be effaced; while the two false routes have only contradictory directions in enigmatical characters. But without abusing the language of allegory, let us seek to give a clear idea of the true principle, and of its two adversaries.

Nature has placed man under the empire of *pleasure* and of *pain*. We owe to them all our ideas; we refer to them all our judgments, and all the determinations of our life. He who pretends to withdraw himself from this subjection, knows not what he says. His only object is to seek pleasure and to shun pain, even at the very instant that he rejects the greatest pleasures or embraces pains the most acute. These eternal and irresistible sentiments ought to be the great study of the moralist and the legislator. The *principle of utility* subjects every thing to these two motives.

*Utility* is an abstract term. It expresses the property or tendency of a thing to prevent some evil or to procure some good. *Evil* is pain, or the cause of pain. *Good* is pleasure, or the cause of pleasure. That which is conformable to the utility, or the interest of an individual, is what tends to augment the total sum of his happiness. That which is conformable to the utility, or the interest of a com-

munity, is what tends to augment the total sum of the happiness of the individuals that compose it.

A *principle* is a first idea, which is made the beginning or basis of a system of reasonings. To illustrate it by a sensible image, it is a fixed point to which the first link of a chain is attached. Such a principle must be clearly evident;—to illustrate and to explain it, must secure its acknowledgment. Such are the axioms of mathematics; they are not proved directly; it is enough to show that they cannot be rejected without falling into absurdity.

The *logic of utility* consists in setting out, in all the operations of the judgment, from the calculation or comparison of pains and pleasures, and in not allowing the interference of any other idea.

I am a partisan of the *principle of utility* when I measure my approbation or disapprobation of a public or private act by its tendency to produce pleasure or pain; when I employ the words *just, unjust, moral, immoral, good, bad*, simply as collective terms including the ideas of certain pains or pleasures; it being always understood that I use the words *pain* and *pleasure* in their ordinary signification, without inventing any arbitrary definition for the sake of excluding certain pleasures or denying the existence of certain pains. In this matter we want no refinement, no metaphysics. It is not necessary to consult Plato, nor Aristotle. *Pain* and *pleasure* are what every body feels to be such—the peasant and the prince, the unlearned as well as the philosopher.

He who adopts the *principle of utility*, esteems virtue to be a good only on account of the pleasures which result from it; he regards vice as an evil only because of the pains which it produces. Moral good is *good* only by its tendency to produce physical good. Moral evil is *evil* only by its tendency to produce physical evil; but when I say *physical*, I mean the pains and pleasures of the soul as



well as the pains and pleasures of sense. I have in view man, such as he is, in his actual constitution.

If the partisan of the *principle of utility* finds in the common list of virtues an action from which there results more pain than pleasure, he does not hesitate to regard that pretended virtue as a vice; he will not suffer himself to be imposed upon by the general error; he will not lightly believe in the policy of employing false virtues to maintain the true.

If he finds in the common list of offences some indifferent action, some innocent pleasure, he will not hesitate to transport this pretended offence into the class of lawful actions; he will pity the pretended criminals, and will reserve his indignation for their persecutors.

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## CHAPTER II.

### *The Ascetic Principle.\**

THIS principle is exactly the rival, the antagonist of that which we have just been examining. Those who follow it have a horror of pleasures. Every thing which gratifies the senses, in their view, is odious and criminal. They found morality upon privations, and virtue upon the renouncement of one's self. In one word, the reverse of the partisans of utility, they approve every thing which tends to diminish enjoyment, they blame every thing which tends to augment it.

This principle has been more or less followed by two

\* Ascetic, by its etymology, signifies *one who exercises*. It was applied to the monks, to indicate their favorite practices of devotion and penitence.

classes of men, who in other respects have scarce any resemblance, and who even affect a mutual contempt. The one class are philosophers, the other, devotees. The ascetic philosophers, animated by the hope of applause, have flattered themselves with the idea of seeming to rise above humanity, by despising vulgar pleasures. They expect to be paid in reputation and in glory, for all the sacrifices which they seem to make to the severity of their maxims. The ascetic devotees are foolish people, tormented by vain terrors. Man, in their eyes, is but a degenerate being, who ought to punish himself without ceasing for the crime of being born, and never to turn off his thoughts from that gulf of eternal misery which is ready to open beneath his feet. Still, the martyrs to these absurd opinions have, like all others, a fund of hope. Independent of the worldly pleasures attached to the reputation of sanctity, these atrabilious pietists flatter themselves that every instant of voluntary pain here below, will procure them an age of happiness in another life. Thus, even the ascetic principle reposes upon some false idea of utility. It acquired its ascendancy only through mistake.\*

The devotees have carried the ascetic principle much further than the philosophers. The philosophical party has confined itself to censuring pleasures; the religious sects have turned the infliction of pain into a duty. The stoics said that pain was not an evil; the Jansenists maintained that it was actually a good. The philosophical party never

\* This mistake consists in representing the Deity in words, as a being of infinite benevolence, yet ascribing to him prohibitions and threats which are the attributes of an implacable being, who uses his power only to satisfy his malevolence.

We might ask these ascetic theologians what life is good for, if not for the pleasures it procures us?—and what pledge we have for the goodness of God in another life, if he has forbidden the enjoyment of this?

reproved pleasures in the mass, but only those which it called gross and sensual, while it exalted the pleasures of sentiment and the understanding. It was rather a preference for the one class, than a total exclusion of the other. Always despised or disparaged under its true name, pleasure was received and applauded when it took the titles of *honor, glory, reputation, decorum, or self-esteem.*

Not to be accused of exaggerating the absurdity of the ascetics, I shall mention the least unreasonable origin which can be assigned to their system.

It was early perceived that the attraction of pleasure might seduce into pernicious acts; that is, acts of which the good was not equivalent to the evil. To forbid these pleasures, in consideration of their bad effects, is the object of sound morals and good laws. But the ascetics have made a mistake, for they have attacked pleasure itself; they have condemned it in general; they have made it the object of a universal prohibition, the sign of a reprobate nature; and it is only out of regard for human weakness that they have had the indulgence to grant some particular exemptions.

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## CHAPTER III.

### SECTION I.

#### *The Arbitrary Principle; or the Principle of Sympathy and Antipathy.*

THIS principle consists in approving or blaming by sentiment, without giving any other reason for the decision except the decision itself. *I love, I hate;* such is the pivot on which this principle turns. An action is judged to be good or bad, not because it is conformable, or the contrary, to the interest of those whom it affects, but because it

pleases or displeases him who judges. He pronounces sovereignly; he admits no appeal; he does not think himself obliged to justify his opinion by any consideration relative to the good of society. "It is my interior persuasion; it is my intimate conviction; I feel it; sentiment consults nobody; the worse for him who does not agree with me—he is not a man, he is a monster in human shape." Such is the despotic tone of these decisions.

But, it may be asked, are there men so unreasonable as to dictate their particular sentiments as laws, and to arrogate to themselves the privilege of infallibility? What you call the *principle of sympathy and antipathy* is not a principle of reasoning; it is rather the negation, the annihilation of all principle. A true anarchy of ideas results from it; since every man having an equal right to give *his* sentiments as a universal rule, there will no longer be any common measure, no ultimate tribunal to which we can appeal.

Without doubt the absurdity of this principle is sufficiently manifest. No man, therefore, is bold enough to say openly, "I wish you to think as I do, without giving me the trouble to reason with you." Every one would revolt against a pretension so absurd. Therefore, recourse is had to diverse inventions of disguise. Despotism is veiled under some ingenious phrase. Of this the greater part of philosophical systems are a proof.

One man tells you that he has in himself something which has been given him to teach what is good and what is evil; and this he calls either his *conscience* or his *moral sense*. Then, working at his ease, he decides such a thing to be good, such another to be bad. Why? Because my moral sense tells me so; because my conscience approves or disapproves it.

Another comes and the phrase changes. It is no longer the moral sense,—it is *common sense* which tells him what

is good and what is bad. This common sense is a *sense*, he says, which belongs to every body; but then he takes good care in speaking of every body to make no account of those who do not think as he does.

Another tells you that this moral sense and this common sense are but dreams; that the *understanding* determines what is good and what is bad. His understanding tells him so and so; all good and wise men have just such an understanding as he has. As to those who do not think in the same way, it is a clear proof that their understandings are defective or corrupt.

Another tells you that he has an *eternal and immutable rule of right*, which rule commands this and forbids that; then he retails to you his own particular sentiments, which you are obliged to receive as so many branches of the eternal rule of right.

You hear a multitude of professors, of jurists, of magistrates, of philosophers, who make the *law of nature* echo in your ears. They all dispute, it is true, upon every point of their system; but no matter,—each one proceeds with the same confident intrepidity, and utters his opinions as so many chapters of the *law of nature*. The phrase is sometimes modified, and we find in its place, *natural right*, *natural equity*, *the rights of man*, &c.

One philosopher undertakes to build a moral system upon what he calls *truth*; according to him, the only evil in the world is, lying. If you kill your father you commit a crime, because it is a particular fashion of saying that he is not your father. Every thing which this philosopher does not like, he disapproves under the pretext that it is a sort of falsehood—since it amounts to asserting that we ought to do what ought not to be done.

The most candid of these despots are those who say openly, "I am one of the elect; and God takes care to enlighten the elect as to what is good and what is evil. He

reveals himself to me, and speaks by my mouth. All you who are in doubt, come, and receive the oracles of God."

All these systems, and many more, are at bottom only the *arbitrary principle, the principle of sympathy and antipathy*, masked under different forms of language. The object is, to make our opinions triumph without the trouble of comparing them with the opinions of other people. These pretended principles are but the pretext and the support of despotism,—at least of that despotism of disposition which has but too much inclination to develop itself in practice whenever it can do so with impunity. The result is, that with the purest intentions, a man torments himself, and becomes the scourge of his fellows. If he is of a melancholy disposition, he falls into a sullen taciturnity, and bitterly deplores the folly and the depravity of man. If he is of an irascible temper, he declaims furiously against all who do not think as he does. He becomes one of those ardent persecutors who do evil in the spirit of holiness; who blow the fires of fanaticism with that mischievous activity which the persuasion of duty always gives; and who brand with the reproach of perversity or of bad faith all who do not blindly adopt the opinions which they hold sacred.

However, it is essential to observe that the *principle of sympathy and antipathy* must often coincide with the *principle of utility*. To love what benefits us, to hate what hurts us, is a universal principle of the human heart. It thus happens that, from one end of the world to the other, acts beneficent or hurtful are regarded with the same sentiments of approbation or dislike. Morality and jurisprudence, led by this kind of instinct, have often reached the great end of utility, without having a clear idea of it. But these sympathies and these antipathies are not a sure and invariable guide. Let a man refer his happiness or his misery to an imaginary cause, and he becomes subject to unfounded loves and unreasonable hates. Superstition,

charlatanism, the spirit of sect and party, repose almost entirely upon blind sympathies and blind antipathies.

Incidents the most frivolous,—a difference in fashion, a slight diversity of opinion, a variety in taste, are enough to present a man to the eyes of another under the aspect of an enemy. What is history, but a collection of the absurdest animosities, the most useless persecutions? A prince conceives an antipathy against certain men who use some indifferent expressions; he calls them Arians, Protestants, Socinians, deists. He builds scaffolds; the ministers of the altar array the executioners; the day on which the heretics perish in the flames is celebrated as a national festival. In Russia a civil war was undertaken to settle a long controversy as to the number of fingers which ought to be used in making the sign of the cross. The citizens of Rome and Constantinople were divided into implacable factions about players, charioteers, and gladiators; and to give importance to such shameful quarrels, it was pretended that the success of the *greens* or of the *blues* presaged abundance or famine, victories or reverses to the empire.

Antipathy may sometimes be found in unison with the principle of utility; but even then it is not a good basis of action. When a person through resentment prosecutes a robber before the tribunals, the action is certainly good; but the motive is dangerous. If it sometimes produces good actions, more often its fruits are fatal. The sole basis of action always surely good, is the consideration of utility. Good is often done from other motives; it is never constantly done except from that consideration alone. Sympathy and antipathy must be subjected to it, to prevent them from becoming hurtful; but the principle of utility is its own regulator; it admits no other; and it is impossible to give that principle too great extension.

To sum up;—the *ascetic principle* attacks utility in front. The *principle of sympathy* neither rejects it nor admits it;

It pays no attention to it; it floats at hazard between good and evil. The ascetic principle is so unreasonable, that its most senseless followers have never attempted to carry it out. The principle of sympathy and antipathy does not prevent its partisans from having recourse to the principle of utility. This last alone neither asks nor admits any exception. *Qui non sub me, contra me*; that which is not under me, is against me; such is its motto. According to this principle, to legislate is an affair of observation and calculation; according to the ascetics, it is an affair of fanaticism; according to the principle of sympathy and antipathy, it is a matter of humor, of imagination, of taste. The first method is adapted to philosophers; the second, to monks; the third is the favorite of wits, of ordinary moralists, of men of the world, of the multitude.

## SECTION II.

### *Causes of Antipathy.*

Antipathy exercises so powerful an influence over morals and legislation, that it is important to investigate the principles which give birth to it.

**FIRST CAUSE.** *Repugnance of Sense.* Nothing is more common than the transition from a physical to a moral antipathy, especially with feeble minds. A multitude of innocent animals suffer a continual persecution, because they have the misfortune to be thought ugly. Every thing unusual has the power of exciting in us a sentiment of disgust and hatred. What is called a *monster*, is only a being which differs a little from others of its kind. Hermaphrodites, whose sex is undetermined, are regarded with a sort of horror, only because they are rare.

**SECOND CAUSE.** *Wounded Pride.* He who does not adopt my opinion, indirectly declares, that he has but little



respect for my knowledge upon the point in dispute. Such a declaration offends my self-love, and shows me an adversary in this man, who not only testifies a degree of contempt for me, but who will propagate that contempt in proportion as his opinion triumphs over mine.

**THIRD CAUSE.** *Power controlled.* Even when our vanity does not suffer, we perceive by the difference of tastes, by the resistance of opinions, by the shock of interests, that our power is limited, that our dominion, which we desire to extend everywhere, is bounded on every side. This compulsive feeling of our own weakness is a secret pain, a germ of discontent against others.

**FOURTH CAUSE.** *Confidence in the future weakened or destroyed.* We love to believe that men are such as we imagine our happiness requires them to be. Every act on their part which tends to diminish our confidence in them, cannot but give us a secret disgust. An example of falsehood makes us see that we cannot always rely upon what they say, or what they promise; an example of absurdity inspires a general doubt as to their reason, and consequently as to their conduct. An act of caprice, or of levity, makes us conclude that we cannot rely on their affections.

**FIFTH CAUSE.** *The desire of unanimity.* Unanimity pleases us. This harmony of sentiment is the only pledge we can have, apart from our own reason, of the truth of our opinions, and of the utility of the actions founded upon those opinions. Besides, we love to dwell upon subjects to our taste; it is a source of agreeable recollections and of pleasing hopes. The conversation of persons whose taste conforms to ours, augments this fund of pleasure, by fixing our attention upon agreeable objects, and presenting them to us under new points of view.

**SIXTH CAUSE.** *Envy.* He who enjoys himself without doing harm to any body, ought not, it would seem, to have

enemies. Yet it may be said that his enjoyment impoverishes those who do not partake it.

It is a common observation, that envy acts with most force against recent advantages, while it spares older ones. Thus it is, that the word *upstart* always has an injurious acceptation. It expresses a new success; envy adds, as accessory ideas, humbling recollections and a feigned contempt.

Envy makes ascetics. The differences of age, of wealth, of circumstances, prevent all men from having equal enjoyments; but the severity of privation can reduce all to the same level. Envy inclines us towards rigid speculations in morals, as a means of reducing the amount of pleasures. It has been said,—and with reason,—that a man who should be born with an organ of pleasure, which the rest of us do not possess, would be pursued as a monster.

Such is the origin of antipathy; such is the collection of sentiments of which it is composed. To moderate its violence, let us recollect that there is no such thing as a perfect conformity even between two individuals; that if we yield to this unsociable sentiment, it will always go on increasing, and will contract more and more the circle of our good-will and of our pleasures; that, in general, our antipathies react against ourselves; that it is in our power to enfeeble, and even to extinguish them, by banishing from our minds the ideas of those objects by which they are excited. Fortunately, the causes of sympathy are constant and natural, while the causes of antipathy are accidental and transitory.

Moral writers may be arranged in two classes: those who labor to extirpate the venomous plants of antipathy; and those who seek to propagate them. The first class are apt to be calumniated; the others gain respect and popularity, because, under the specious veil of morals, they are in the service of vengeance and of envy. The books which attain the most speedy celebrity, are those which the demon

of antipathy has dictated, such as libels, works of party, satirical memoirs, &c. *Telemachus* did not owe its brilliant success to its morality, or to the charm of its style; but to the general opinion that it contained a satire upon Louis XIV. and his court. When Hume, in his history, wished to calm the spirit of party, and to treat the passions like a chemist who analyzes poisons, the mob of readers rose up against him; they did not like to see it proved that men were rather ignorant than wicked, and that past ages, always extolled to depreciate the present, had been far more fertile in misfortunes and crimes.

Fortunate for himself, fortunate is the writer who can give himself up to these two false principles! To him belong the field of eloquence, the employment of figures, the vehemence of style, exaggeration of expressions, and all the vulgar vocabulary of the passions. All his opinions are dogmas, eternal, immutable truths, as immovable as God and nature. As a writer, he exercises the power of a despot, and proscribes those who do agree with him.

The partisan of the principle of utility is in a position by no means so favorable to eloquence. His means are as different as his object. He can neither dogmatize, dazzle, nor astonish. He is obliged to define all his terms, and always to employ the same word in the same sense. He consumes a long time in getting ready, in making sure of his foundation, in preparing his instruments; and he has every thing to fear from that impatience which grows weary with preliminaries, and which wishes to arrive in a moment at great results. However, this slow and cautious advance is the only one which leads to the end desired; for if the power of spreading truth among the multitude belongs to eloquence, the power of discovering it, appertains only to analysis.

## CHAPTER IV.

*Operation of these principles upon Legislation.*

THE principle of utility has never yet been well developed, nor well followed out by any legislator; but, as we have already mentioned, it has penetrated, from time to time, into laws, from its occasional alliance with the principles of sympathy and antipathy. The general ideas of vice and virtue, founded upon a confused perception of good and evil, have been sufficiently uniform in every essential point; and the early laws, without which no society can exist, have been made in conformity with these popular ideas.

The ascetic principle, though embraced with warmth by its partisans in their private conduct, has never had much direct influence upon the operations of government. On the contrary, every government has had for its system and its object, the acquisition of strength and prosperity. The rulers of states have never made evil an end; they have been seduced into it by false views of greatness and power, or by private passions which have resulted in public evils. The system adopted at Sparta,—a discipline which well entitles that community to be called a convent of warriors,—in relation to the circumstances of that state, was necessary to its preservation, or, at least, was esteemed so by its legislator; and under that aspect, was conformable to the principle of utility. Many christian states have permitted the establishment of monastic orders; but the vows are *supposed* to be voluntary. To torment one's self was esteemed a work of merit; to torment another against his will has been always regarded as a crime. St. Louis wore sackcloth, but he obliged none of his subjects to wear it.

The principle which has exercised the greatest influence upon governments, is that of sympathy and antipathy. In

fact, we must refer to that principle all those specious objects which governments pursue, without having the general good for a single and independent aim; such as good morals, equality, liberty, justice, power, commerce, religion; objects respectable in themselves, and which ought to enter into the views of the legislator; but which too often lead him astray, because he regards them as ends, not as means. He substitutes them for public happiness, instead of making them subordinate to it.

Thus, a government, entirely occupied with wealth and commerce, looks upon society as a workshop, regards men only as productive machines, and cares little how much it torments them, provided it makes them rich. The customs, the exchanges, the stocks, absorb all its thoughts. It looks with indifference upon a multitude of evils which it might easily cure. It wishes only for a great production of the means of enjoyment, while it is constantly putting new obstacles in the way of enjoying.

Other governments esteem power and glory as the sole means of public good. Full of disdain for those states which are able to be happy in a peaceful security, they must have intrigues, negotiations, wars and conquests. They do not consider of what misfortunes this glory is composed, and how many victims these bloody triumphs require. The eclat of victory, the acquisition of a province, conceal from them the desolation of their country, and make them mistake the true end of government.

Many persons do not inquire if a state be well administered; if the laws protect property and persons; if the people are happy. What they require, without giving attention to any thing else, is political liberty,—that is, the most equal distribution which can be imagined of political power. . . . Wherever they do not see the form of government to which they are attached, they see nothing but slaves; and if these pretended slaves are well satisfied with their con-

dition, if they do not desire to change it, they despise and insult them. In their fanaticism they are always ready to stake all the happiness of a nation upon a civil war, for the sake of transporting power into the hands of those whom an invincible ignorance will not permit to use it, except for their own destruction.

These are examples of some of the phantasies, which are substituted in politics, instead of the true search after happiness. They do not grow out of an opposition to happiness; they are the fruits of inadvertence or mistake. A small part of the plan of utility is seized upon; an exclusive attachment is evinced for that small part; in the pursuit of some particular branch of the public good, the general happiness is disregarded; it is forgotten that all these particular objects have only a relative value, and that happiness alone has a value which is intrinsic.

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## CHAPTER V.

### *Further explanations. Objections answered.*

SOME trifling objections, some little verbal difficulties, may be raised against the *principle of utility*; but no real or distinct objection can be opposed to it. In fact, how can it be contested except by reasons taken from itself? To say that it is a dangerous principle, is to say that it would be contrary to utility to consult utility.

The difficulty upon this question grows out of a kind of perversion of language. It has been customary to speak of *virtue* in opposition to *utility*. Virtue is described as the sacrifice of our interest to our duties.

To convey clear ideas upon this subject, it should be explained, that there are interests of different orders, and that different interests, in certain circumstances, are incompati-

ble. Virtue is the sacrifice of a less interest to a greater, of a momentary to a durable, of a doubtful to a certain interest. Every idea of virtue not derived from this notion, is as obscure in conception as it is precarious in motive.

Those who, for the sake of accommodation, are willing to distinguish between politics and morals, to assign utility as the principle of the one, and justice as the foundation of the other, announce nothing but confused ideas. The only difference between politics and morals is, that one directs the operations of governments, and the other the actions of individuals; but their object is common; it is happiness. That which is politically good cannot be morally bad, unless we suppose that the rules of arithmetic, true for large numbers, are false for small ones.

While we imagine that we follow the *principle of utility*, we may nevertheless do evil. A feeble and narrow soul deceives itself by taking into consideration but a small part of evil or of good. An ardent disposition deceives itself by giving an extreme importance to a particular good, by which all consecutive evils are concealed from its sight. That which constitutes a bad man, is the habit of pleasures injurious to others; but this very habit supposes the absence of many kinds of pleasure. One ought not to hold *utility* responsible for mistakes contrary to its nature, and which it alone is able to rectify. If a man calculates badly, it is not arithmetic which is in fault; it is himself. If the charges which are alleged against Machiavel are well founded, his errors did not spring from having consulted the principle of utility, but from having applied it badly. This fact, the author of the *Anti-Machiavel* has clearly perceived. He refutes the *Prince* by making it appear that its maxims are fatal; and that bad faith is bad policy.

Those who, from reading Cicero's *Offices* and the Platonic moralists, have a confused notion of the *useful* as op-

posed to the *honest*, often quote that observation of Aristides upon the scheme which Themistocles was unwilling to disclose, except to him alone. "The project of Themistocles is *very advantageous*," said Aristides to the assembled people, "but it is *very unjust*." Here seems to be a decided opposition between the useful and the just. Not so. It is only a comparison of good and evil. *Unjust* is a term which presents the collective idea of all those evils which result from a situation in which men can no longer trust one another. Aristides might have said, "the project of Themistocles would be useful for a moment, but injurious for ages; what it would give is nothing in comparison with what it would take away." \*

It is sometimes said that the *principle of utility* is only a revival of epicureanism. The ravages which that doctrine made in morals are well known. It was adopted by the most corrupt of men.

It is true that Epicurus alone of all the ancients had the merit of having known the true source of morals; but to suppose that his doctrine leads to the consequences that have been imputed to it, is to suppose that happiness may become the enemy of happiness. *Sic presentibus utaris voluptatibus, ut futuris non noceas*,—So use present pleasures as not to lessen those which are to come. In this sentiment Seneca coincides with Epicurus; and what more can morality desire than the retrenchment of every pleasure injurious to one's self or to others? Now this is the very principle of utility.

But, it is again objected, every one makes himself the judge of his own utility, and upon this system every obli-

\* This anecdote is not worth being cited except to clear up the sense of words. Its falsity has been proved. See Mitford's *History of Greece*. Plutarch wished to compliment the Athenians; but he would have been much embarrassed to reconcile the greater part of their history with this noble sentiment.



gation will lose its force the moment people cease to see their interest in regarding it.

Every one makes himself the judge of his own utility; such is the fact, and such it ought to be; otherwise man would not be a rational agent. He who is not a judge of what is agreeable to him, is less than a child; he is an idiot. The obligation which binds men to their engagements is nothing but the perception of a superior interest, which prevails over an inferior interest. A man is bound not only by the particular utility of such or such an engagement; but when the engagement becomes onerous to one of the parties, he is still bound by the general utility of engagements; by the confidence in his word which every sensible man wishes to inspire, in order that he may be considered a man of truth, and enjoy the advantages incident to the reputation of probity. It is not the engagement itself which constitutes the obligation; for some engagements are void, and some are unlawful. Why?—Because they are esteemed injurious. It is then the utility of a contract which gives force to it.

It is easy to reduce to a calculation of good and of evil all the acts of the most exalted virtue; and virtue is neither degraded nor weakened by being represented as an effect of reason, and being explained in a simple and intelligible manner.

If we refuse to acknowledge the principle of utility, we fall into a complete circle of sophistry. I ought to keep my promise. Why? Because my conscience bids me do it. How do you know that your conscience bids you do it? Because I have an interior feeling to that effect. Why ought you to obey your conscience? Because God is the author of my nature, and to obey my conscience is to obey God. Why ought you to obey God? Because it is my first duty. How do you know that? My conscience tells me so; &c. &c. We can never get out of this circle, which

presently becomes the source of obstinate and inveterate error. For if we judge of every thing by feeling, there is no means left to distinguish the dictates of an enlightened conscience from those of a blinded one. All persecutors will have the same pretence; all fanatics the same right.

If you desire to reject the principle of utility because it may be ill applied, what is there to put in its place? Where is the rule which cannot be abused? Where is this infallible guide?

Will you substitute for it some despotic principle, which orders men, like passive slaves, to act so and so, without knowing why?

Will you substitute for it some fluctuating and capricious principle, founded only upon your own intimate and particular feelings?

If so, what motives will you hold out to induce people to follow you? Shall these motives be independent of interest? In that case, if people do not agree with you, how will you reason with them,—how bring them to terms? Whither will you cite all the sects, all the systems, all the contradictions that cover the world, if not to the tribunal of a common interest?

The most obstinate opposers of the principle of utility are those who take their stand upon what they call the *religious principle*. They profess to take the will of God for the only rule of good and evil. It is the only rule, they say, which has all the requisite characters; which is infallible, universal, sovereign, and so on. I answer that the religious principle is not a distinct principle by itself; it is only a particular form of one or the other of those above described. Unless God explains himself to each individual by immediate acts and particular revelations, what is called his will can only be what we presume to be such. How does a man presume the will of God? From his own. Now his particular will is always directed by one of the

three principles above described. How do you know that God forbids such and such a thing? "Because it would be prejudicial to the happiness of mankind," answers the partisan of utility. "Because it includes a gross and sensual pleasure," says the ascetic. "Because it wounds the conscience, is contrary to natural sentiments, and ought to be detested without stopping to examine it,"—such is the language of antipathy.

But revelation, it will be said, is the direct expression of the will of God. There is nothing left to be questioned or disputed. Here is a guide far preferable to human reason.

I do not answer indirectly that revelation is not universal; that even among christian nations there are many persons who do not admit it; and that in morals and politics, some principle of reasoning is necessary, which is common to all men. But I reply that revelation is not a system of politics nor of morals; that all its precepts need to be explained, modified and limited, one by the other; that, taken in a literal sense, they would overturn the world, annihilate self-defence, industry, commerce, reciprocal attachments; and that ecclesiastical history is an incontestable proof of the frightful evils which have resulted from religious maxims badly understood.

What a difference between the Protestant and Catholic theologians—between the moderns and the ancients! The gospel morality of Paley is not the gospel morality of Nicole. That of the Jansenists was not that of the Jesuits.

The interpreters of scripture may be divided into three classes. The first class have the principle of utility for their rule of criticism; the second class are ascetics; the third class follows the mixed impressions of sympathy and antipathy. The first, far from excluding pleasure, quote it as a proof of the goodness of God. The ascetics are its mortal enemies; if they ever permit it, it is not for itself,

but only in view of some certain necessary end. The last approve it, or condemn it, according to their fancy, without being guided by the consideration of consequences. It seems, then, that revelation is not a principle by itself; for nothing can be properly called a principle except that which needs no proof, and which serves to prove every thing else.

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## CHAPTER VI.

### *The different kinds of Pleasures and Pains.*

WE experience without cessation a variety of sensations which do not interest us, and which glide by without fixing our attention. Thus, the greater part of the objects which are familiar to us no longer produce a sensation sufficiently vivid to cause us either pain or pleasure. These names cannot be given except to sensations which attract our attention; which make themselves noticeable in the crowd; and of which we desire the continuance or the end. These pleasurable perceptions are either simple or complex: simple, when they cannot be decomposed into others; complex, when they are composed of several simple pains or simple pleasures, or perhaps of a mixture of pleasures and pains. What determines us to regard several pleasures as a complex pleasure, and not as so many simple pleasures, is, the nature of the cause which excites them. We are led to consider all the pleasures which are produced by the action of the same cause, as a single pleasure. Thus a theatrical show which gratifies many of our senses at the same time by the beauty of decorations, music, company, dresses, and the action of performers, constitutes a complex pleasure.

It has cost a great labor of analysis to prepare a complete catalogue of the simple pleasures and pains. This cata-

logue has a dryness which will repulse many readers, for it is not the work of a writer of romance, who only seeks to please and move; it is a bill of particulars, it is the inventory of our sensations.

## SECTION I.

### *Simple Pleasures.*

1st. *Pleasures of Sense.* Those which can be immediately referred to our organs independently of all associations, viz. the pleasures of *taste*, of *smell*, of *sight*, of *hearing*, of *touch*, especially the blessing of *health*, that happy flow of spirits, that perception of an easy and unburdensome existence, which cannot be referred to any of the senses in particular, but which appertains to all the vital functions; finally the pleasures of *novelty*, those which we experience when new objects are applied to our senses. They do not form a separate class, but they play so conspicuous a part, that it is necessary to mention them expressly.

2d. *Pleasures of Riches*; meaning thereby that kind of pleasure which we derive from the possession of a thing, which is a means of enjoyment or security,—a pleasure which is most lively at the moment of acquisition.

3d. *Pleasures of Address.* Those which result from some difficulty overcome, from some relative perfection in the handling and employ of the instruments which aid in the attainment of pleasure or utility. A person who touches a harpsichord, for example, experiences a pleasure perfectly distinct from that of hearing the same piece of music executed by another.

4th. *Pleasures of Friendship.* Those which accompany the persuasion of possessing the good will of such and such individuals, and the right of expecting from them, in consequence, spontaneous and gratuitous services.

5th. *Pleasures of a good Reputation.* Those which ac-

company the possession or acquisition of the esteem and good will of the people about us, the persons with whom we may have relations or common interests; and as a fruit of this disposition on their part, the right of expecting their voluntary and gratuitous services, should we happen to need them.

6th. *Pleasures of Power.* Those which a man experiences who perceives in himself the means of disposing others to serve him through their hopes or their fears; that is, by the fear of some evil, or the hope of some good which he can do them.

7th. *Pleasures of Piety.* Those which accompany the persuasion of acquiring or possessing the favor of God; and the power, in consequence, of expecting particular favors from him, either in this life or in another.

8th. *Pleasures of Benevolence.* Pleasures which we are sensible of tasting, when we contemplate the happiness of those who love us. They may also be called *pleasures of sympathy* or *pleasures of the social affections*. Their force is more or less expansive. They have the power of concentrating themselves into a narrow circle, or of spreading over entire humanity. Benevolence extends itself to animals of which we love the species or individuals; the signs of their happiness affect us agreeably.

9th. *Pleasures of Malevolence.* They result from the sight or the thought of pain endured by those beings who do not love us, whether men or animals. They may also be called *pleasures of the irascible passions, of antipathy, or of the anti-social affections*.

10th. When we apply our mental faculties to the acquisition of new ideas, and discover, or think we discover, interesting truths in the moral or physical sciences, the pleasure which we experience may be called the *pleasure of knowledge*. The transport of joy which Archimedes felt at the

solution of a difficult problem, is easily understood by all those who have applied themselves to abstract studies.

11th. When we have tasted such or such a pleasure, and in certain cases even, when we have suffered such or such a pain, we love to retrace them exactly in the precise order of all their circumstances. These are the *pleasures of memory*. They are as varied as the recollections in which they originate.

12th. But sometimes memory suggests certain pleasures, which we arrange in a different order, according to our desires; and to which we join the most agreeable circumstances we have noticed, either in our own life or in that of others. These are *pleasures of the imagination*. The painter who copies after nature, represents the operations of memory; he who selects groups here and there, and arranges them to suit himself, represents the workings of the imagination. New ideas in the arts and sciences, and all discoveries which interest our curiosity, contribute to the pleasures of the imagination, which sees in these discoveries an extension of its field of enjoyments.

13th. The idea of a future pleasure, joined to the expectation of presently enjoying it, constitutes the *pleasure of hope*.

14th. *Pleasures of Association*. An object may be unable to give any pleasure in itself; but if it is connected in the mind with some other object which is agreeable, it participates in the charm of that object. Thus the different incidents of a game of chance, when we play for nothing, derive their interest from an association with the pleasure of gaining.

15th. Lastly, there are pleasures founded upon pains. When one has suffered, the cessation or diminution of the pain is itself a pleasure, and often a very lively one. These may be called *pleasures of relief, or of deliverance*. They are as various as our pains.

Such are the materials of all our enjoyments. They unite, combine, and modify each other in a thousand ways, so that it requires some little attention and experience to discover in a complex pleasure, all the simple pleasures which are its elements.

The delight which a country landscape gives, is composed of different pleasures—pleasures of the senses, of the imagination, and of sympathy. The variety of objects and their various colors, the flowers, the trees, the intermixture of light and shade, gratify the sight; the ear is soothed by the song of birds, the murmur of fountains, and the gentle rustling which the wind makes among the leaves; the air, embalmed with the perfume of fresh vegetation, wafts agreeable odors; while its elastic purity makes the circulation more rapid and exercise more agreeable. Imagination and benevolence unite to embellish the scene, by presenting ideas of wealth, of abundance, of fertility. The innocence and happiness of the birds, the flocks, and the domestic animals, furnish an agreeable contrast to the recollection of the fatigues and agitations of human life. We transfer to the inhabitants of the country all the pleasures with which the novelty of these objects inspires us. Finally, a sentiment of gratitude to that eternal Being, whom we regard as the author of all these benefits, augments our confidence and our admiration.

## SECTION II.

### *Simple Pains.*

1st. *Pains of Privation.* These correspond to all the pleasures whose absence excites a sentiment of chagrin. They exist in three principal modifications. *First*, if we desire a certain pleasure, but have more fear of wanting it than hope of obtaining it, the pain that results may be called



*pain of desire, or of unsatisfied desire.* *Second*, if we have had strong hopes of enjoying the pleasure in question, but these hopes have suddenly failed, this privation is a *pain of disappointment.* *Third*, if we have enjoyed a good, or, what amounts to the same thing, if we have counted strongly upon its possession, and then lose it, the sentiment which this loss produces is called *regret.* That languor of soul described by the word *ennui* is a pain of privation which cannot be referred to any particular object, but to the absence of every agreeable sensation.

2d. *Pains of Sense.* There are nine kinds: those of *hunger* and *thirst*; those of *taste*, of *smell*, of *touch*, produced by the application of substances which excite disagreeable sensations; those of *hearing* and *sight*, produced by sounds or images which offend those organs, independently of association; *excess of cold or heat*,—unless these pains ought to be referred to the sense of touch; *diseases of all kinds*; finally, *fatigue*, whether of mind or body.

3d. *Pains of Mal-address.* Those which are sometimes experienced in fruitless attempts or laborious efforts to apply to their different uses the various kinds of tools or instruments whether of pleasure or pain.

4th. *Pains of Enmity.* Those which a man feels when he believes himself an object of malevolence on the part of certain individuals, and apprehends that he may be exposed in consequence to experience the practical effects of their hatred.

5th. *Pains of a bad Reputation.* Those which a man feels when he believes himself actually an object of the malevolence or contempt of the world which surrounds him, or exposed to become so. They may also be called *pains of dishonor*, or *pains of the popular sanction.*

6th. *Pains of Piety.* They result from the fear of having offended the supreme Being, and of incurring his chastisements, either in this life or in the life to come. If they are

thought to be well founded, they are called *religious fears*,—if ill-founded, they are denominated *superstitious fears*.

7th. *Pains of Benevolence*. These are the pains which we experience at the sight or thought of the suffering whether of men or animals. The emotions of pity make us weep at the miseries of others, as well as at our own. They may also, be called *pains of sympathy*, *pains of the social affections*.

8th. *Pains of Malevolence*. These are the pains we experience at reflecting on the happiness of those we hate. They may also be called *pains of antipathy*, *pains of the anti-social affections*.

9th, 10th, and 11th. The *pains of memory*, of the *imagination*, and of *fear*, are the exact reverse and counterpart of the pleasures of corresponding names.

The labor of preparing this catalogue of pleasures and pains is dry, but its utility is great. The whole system of morals, the whole system of legislation, rests upon a single basis, and that basis is, the *knowledge of pains and pleasures*. It is the only foundation of clear ideas upon those subjects. When we speak of vices and virtues, of actions innocent or criminal, of a system remuneratory or penal, what is it that we speak of? Of pains and pleasures, and of nothing else. A reason in morals or politics, which cannot be translated by the simple words *pain* or *pleasure*, is an obscure and sophistical reason, from which nothing can be concluded.

You wish, for example, to study the subject of offences,—that great object which directs all legislation. This study, at bottom, will be nothing but a comparison, a calculation, of pains and pleasures. You consider the *criminality* or the *evil* of certain actions,—that is, the pains which result from them to such and such individuals; the *motive* of the delinquent,—that is, the expectation of pleasure, which led him to commit the action in question; the *advantage* of the

offence,—that is, the acquisition of pleasure which has resulted from it; the *legal punishment* which ought to be inflicted,—that is, what pain the guilty person ought to undergo. It thus appears that the theory of pains and pleasures is the sole foundation of all knowledge upon the subject of legislation.

The more these two catalogues are examined, the more matter for reflection they will be found to contain.

It is obvious at once, that pleasures and pains may be divided into two classes: *pleasures and pains which relate to others*;—*pleasures and pains purely personal*. Those of benevolence and of malevolence compose the first class; all the rest belong to the second.

It is worthy of observation that many kinds of pleasure exist without having corresponding pains. 1st. *Pleasures of novelty*. The sight of new objects is a source of pleasures, while the simple absence of new objects is not felt as a pain. 2d. *Pleasures of love*. The want of them is not attended with positive pain, except when there is disappointment. Some temperaments may suffer from this want, but in general continence is in the power of every one, and is very far from being a state of pain. 3d. *Pleasures of riches and of acquisitions*; they have no corresponding pains except where there is disappointment. To acquire is always agreeable; simple non-acquisition is not felt as a pain. 4th. It is the same with the *pleasures of power*. Their possession is a good; their mere absence is not an evil; it is only felt as an evil by reason of some particular circumstance, such as privation or disappointment.

## CHAPTER VII.

*Pains and Pleasures considered as Sanctions.*

THE will cannot be influenced except by motives; but when we speak of *motives*, we speak of *pleasures* or *pains*. A being whom we could not affect either by painful or pleasurable emotions, would be completely independent of us.

The pain or pleasure which is attached to a law, form what is called its sanction. The laws of one state are not laws in another, because they have no sanction there, no obligatory force.

Pleasures and pains may be distinguished into four classes:

- 1st. Physical.
- 2d. Moral.
- 3d. Political.
- 4th. Religious.

Consequently, when we come to consider pains and pleasures, under the character of punishments and rewards, attached to certain rules of conduct, we may distinguish four sanctions.

1st. Those pleasures and pains which may be expected in the ordinary course of nature, acting by itself, without human intervention, compose the *natural or physical sanction*.

2d. The pleasures or pains which may be expected from the action of our fellow-men, in virtue of their friendship or hatred, of their esteem or their contempt, in one word, of their spontaneous disposition towards us, compose the *moral sanction*; or it may be called the *popular sanction*, *sanction of public opinion*, *sanction of honor*, *sanction of the pains and pleasures of sympathy*.

3d. The pleasures or pains which may be expected from

the action of the magistrate, in virtue of the laws, compose the *political sanction* ; it may also be called the *legal sanction*.

4th. The pleasures or pains which may be expected in virtue of the threats or promises of religion, compose the *religious sanction*.

A man's house is destroyed by fire. Is it in consequence of his imprudence?—It is a pain of the natural sanction. Is it by the sentence of a judge?—It is a pain of the political sanction. Is it by the malice of his neighbors?—It is a pain of the popular sanction. Is it supposed to be the immediate act of an offended divinity?—In such a case it would be a pain of the religious sanction, or, vulgarly speaking, a judgment of God.

It is evident from this example, that the same sort of pains belong to all the sanctions. The only difference is in the circumstances which produce them.

This classification will be very useful in the course of this work. It is an easy and uniform nomenclature, absolutely necessary to distinguish and describe the different kinds of moral powers, those intellectual levers which constitute the machinery of the human heart.

These four sanctions do not act upon all men in the same manner, nor with the same degree of force. They are sometimes rivals, sometimes allies, and sometimes enemies. When they agree, they operate with an irresistible power ; when they are in opposition, they mutually enfeeble each other ; when they are rivals, they produce uncertainties and contradictions in the conduct of men.

Four bodies of laws may be imagined, corresponding to these four sanctions. The highest point of perfection would be reached, if these four codes constituted but one. This perfection however is as yet far distant, though it may not be impossible to attain it. But the legislator ought always to recollect that he can operate directly only by means of

the political sanction. The three others must necessarily be its rivals or its allies, its antagonists or its ministers. If he neglects them in his calculations, he will be deceived in his results ; but if he makes them subservient to his views, he will gain an immense power. There is no chance of uniting them, except under the standard of utility.

The natural sanction is the only one which always acts ; the only one which works of itself ; the only one which is unchangeable in its principal characteristics. It insensibly draws all the others to it, corrects their deviations, and produces whatever uniformity there is in the sentiments and the judgments of men.

The popular sanction and the religious sanction are more variable, more dependent upon human caprices. Of the two, the popular sanction is more equal, more steady, and more constantly in accordance with the principle of utility. The force of the religious sanction is more unequal, more apt to change with times and individuals, more subject to dangerous deviations. It grows weak by repose, but revives by opposition.

In some respects the political sanction has the advantage of both. It acts upon all men with a more equal force ; it is clearer and more precise in its precepts ; it is surer and more exemplary in its operations ; finally, it is more susceptible of being carried to perfection. Its progress has an immediate influence upon the progress of the other two ; but it embraces only actions of a certain kind ; it has not a sufficient hold upon the private conduct of individuals ; it cannot proceed except upon proofs which it is often impossible to obtain ; and secrecy, force, or stratagem are able to escape it. It thus appears, from considering what each of these sanctions can effect, and what they cannot, that neither ought to be rejected, but that all should be employed, and directed towards the same end. They are like magnets, of which the virtue is destroyed when they are presented to

each other by their contrary poles, while their power is doubled when they are united by the poles which correspond.

It may be observed, in passing, that the systems which have most divided men, have been founded upon an exclusive preference given to one or the other of these sanctions. Each has had its partisans, who have wished to exalt it above the others. Each has had its enemies, who have sought to degrade it by showing its weak side, exposing its errors, and developing all the evils which have resulted from it, without making any mention of its good effects. Such is the true theory of all those paradoxes which elevate nature against society, politics against religion, religion against nature and government, and so on.

Each of these sanctions is susceptible of error, that is to say, of some applications contrary to the principle of utility. But by applying the nomenclature above explained, it is easy to indicate by a single word the coat of the evil. Thus, for example, the reproach which after the punishment of a criminal, falls upon an innocent family, is an error of the popular sanction. The offence of usury, that is of receiving interest above the legal interest, is an error of the political sanction. Heresy and magic are errors of the religious sanction. Certain sympathies and antipathies are errors of the natural sanction. The first germ of mistake exists in some single sanction, whence it commonly spreads into the others. It is necessary, in all these cases, to discover the origin of the evil before we can select or apply the remedy.

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## CHAPTER VIII.

### *The measure of Pleasures and Pains.*

THE sole object of the legislator is, to increase pleasures and to prevent pains; and for this purpose he ought to be

well acquainted with their respective values. As pleasures and pains are the only instruments which he employs, he ought carefully to study their power.

If we examine the *value* of a pleasure, considered in itself, and in relation to a single individual, we shall find that it depends upon four circumstances,—

- 1st. *Its intensity.*
- 2d. *Its duration.*
- 3d. *Its certainty.*
- 4th. *Its proximity.*

The value of a pain depends upon the same circumstances.

But it is not enough to examine the value of pleasures and pains as if they were isolated and independent. Pains and pleasures may have other pains and pleasures as their consequences. Therefore if we wish to calculate the *tendency* of an act from which there results an immediate pain or pleasure, we must take two additional circumstances into the account, viz.—

- 5th. *Its productiveness.*
- 6th. *Its purity.*

A *productive pleasure* is one which is likely to be followed by other pleasures of the same kind.

A *productive pain* is one which is likely to be followed by other pains of the same kind.

A *pure pleasure* is one which is not likely to produce pains.

A *pure pain* is one which is not likely to produce pleasures.

When the calculation is to be made in relation to a collection of individuals, yet another element is necessary:

- 7th. *Its extent;*

That is, the number of persons who are likely to find themselves affected by this pain or pleasure.

When we wish to value an action, we must follow in detail all the operations above indicated. These are the



elements of moral calculation ; and legislation thus becomes a matter of arithmetic. The *evil* produced is the outgo, the *good* which results is the income. The rules of this calculation are like those of any other. This is a slow method, but a sure one ; while what is called sentiment is a prompt estimate, but apt to be deceptive. It is not necessary to recommence this calculation upon every occasion. When one has become familiar with the process ; when he has acquired that justness of estimate which results from it ; he can compare the sum of good and of evil with so much promptitude, as scarcely to be conscious of the steps of the calculation. It is thus that we perform many arithmetical calculations almost without knowing it. The analytical method, in all its details, becomes essential, only when some new or complicated matter arises ; when it is necessary to clear up some disputed point, or to demonstrate a truth to those who are yet unacquainted with it.

This theory of moral calculation, though never clearly explained, has always been followed in practice ; at least in every case where men have had clear ideas of their interest. What is it, for example, that makes up the value of a landed estate ? Is it not the amount of pleasure to be derived from it ? and does not this value vary according to the length of time for which the estate is to be enjoyed ; according to the nearness or the distance of the moment when the possession is to begin ; according to the certainty or uncertainty of its being retained ?

Errors, whether in legislation or the moral conduct of men, may be always accounted for by a mistake, a forgetfulness, or a false estimate of some one of these elements, in the calculation of good and evil.

## CHAPTER IX.

*Circumstances which affect Sensibility.*

ALL causes of pleasure do not give the same pleasure to all; all causes of pain do not always produce the same pain. It is in this that *difference of sensibility* consists. This difference is in degree, or in kind: in degree, when the impression of a given cause upon many individuals, is uniform, but unequal; in kind, when the same cause produces opposite sensations in different individuals.

This difference of sensibility depends upon certain circumstances which influence the physical or moral condition of individuals, and which being changed, produce a corresponding change in their feelings. This is an experimental fact. Things do not affect us in the same manner in sickness and in health, in plenty and in poverty, in infancy and old age. But a view so general is not sufficient; it is necessary to go deeper into the human heart. Lyonet wrote a quarto volume upon the anatomy of the caterpillar; morals are in need of an investigator as patient and philosophical. I have not courage to imitate Lyonet. I shall think it sufficient if I open a new point of view,—if I suggest a surer method to those who wish to pursue this subject.

1st. The foundation of the whole is *temperament*, or the original constitution. By this word I understand that radical and primitive disposition which attends us from our birth, and which depends upon physical organization, and the nature of the soul.

But although this radical constitution is the basis of all the rest, this basis lies so concealed that it is very difficult to get at it, so as to distinguish those varieties of sensibility which it produces, from those which belong to other causes.

It is the business of the physiologist to distinguish these temperaments; to follow out their mixtures; and to trace their effects. But these grounds are as yet too little known, to justify the moralist or legislator in founding anything upon them.

2d. *Health.* We can hardly define it except negatively. It is the absence of all sensation of pain or uneasiness of which the first seat can be referred to some part of the body. As to sensibility in general, it is to be observed, that when sick, we are less sensible to the causes of pleasure, and more so to those of pain.

3d. *Strength.* Though connected with health, this is a separate circumstance;—since a man may be feeble compared with the average of men, and yet not be an invalid. The degree of strength may be measured exactly enough by the weight one can lift, or in other ways. *Feebleness* is sometimes a negative term, signifying the absence of strength; sometimes a relative term, signifying that such an individual is not so strong as such another, with whom he is compared.

4th. *Corporal Imperfections.* I mean some remarkable deformity; the want of some limb or some faculty which other men enjoy. Its particular effects upon sensibility depend upon the kind of imperfection. Its general effect is, to diminish more or less, agreeable impressions, and to aggravate those which are painful.

5th. *The degree of Knowledge.* That is, the amount of ideas which an individual possesses of a nature calculated to exercise an influence upon his happiness, or that of others. The man of knowledge is he who possesses many of these important ideas; the ignorant, he who has but few, and those few of minor importance.

6th. *Strength of the Intellectual Faculties.* That is, the degree of facility in recalling ideas already acquired, or in acquiring new ones. Different qualities of mind may be

referred to this head; such as exactness of memory, capacity of attention, clearness of discernment, vivacity of imagination, &c.

7th. *Firmness of Soul.* This quality is attributed to a man when he is less affected by immediate pleasures or pains, than by great pleasures or great pains, which are distant or uncertain. Turenne lacked firmness of soul when he was prevailed upon by the prayers of a woman to betray a state secret. The young Lacedemonians, who suffered themselves to be scourged to death before the altar of Diana, without uttering a single cry, proved that the fear of shame and the hope of glory had more influence over them than present pain of the most piercing kind.

8th. *Perseverance.* This circumstance relates to the *length* of time, during which a given motive acts upon the will with a continuous force. We say of a man that he wants perseverance when the motive which makes him act, loses all its force without the happening of any external event, or the occurrence of any reason which ought to weaken it; or when he is susceptible of yielding by turns to a great variety of motives. It is thus that children are delighted with playthings, yet soon grow tired of them.

9th. *The bent of Inclination.* The ideas we have previously formed of a pleasure or a pain, have a great influence upon the manner in which we are affected, when we come to experience that pleasure or that pain. The effect does not always answer the expectation, though it commonly does so. The pleasure which results from the possession of a woman is not to be measured by her beauty, but by the passion of her lover. The inclinations of a man being known, we can calculate with tolerable certainty the pleasure or the pain which a given event will cause him.\*

\* The four following circumstances are only subdivisions of this head; they are passions, that is inclinations, considered in reference to certain given pleasures and pains.

10th. *Notions of Honor.* By *honor* is meant that sensibility to pains and pleasures, which springs from the opinion of other men; that is, from their esteem or their contempt. The ideas of honor vary much with nations and with individuals; so that it becomes necessary to distinguish, in the first place, the force of this motive, in the second place, its direction.

11th. *Notions of Religion.* It is well known to what a degree the entire system of sensibility may be affected by religious ideas. It is at the birth of a religion that its greatest effects appear. Mild nations have become bloody; pusillanimous nations have grown bold; slaves have regained their freedom; and savages have submitted to the yoke of civilization. There is not any cause which has produced such sudden and extraordinary effects upon mankind. There is also an astonishing diversity in the particular bias which religion gives to individuals.

12th. *Sentiments of Sympathy.* I call *sympathy* that disposition which makes us find pleasure in the happiness of others, and compels us to share their pains. When this disposition extends to a single individual only, it is called *friendship*; when it acts in relation to persons in pain, it is called *pity* or *compassion*; if it embraces an entire class of individuals, it constitutes what is called *esprit-du-corps*, or *party spirit*; if it embraces a whole nation, it is *public spirit* or *patriotism*; if it extends to all men, it is *humanity*.

But the kind of sympathy which plays the greatest part in common life, is that which binds the affections to certain fixed individuals, such as parents, children, a husband, a wife, an intimate friend. Its general effect is, to augment the sensibility, whether to pains or pleasures. The individual acquires more extension; he ceases to be solitary; he becomes collective. We see ourselves, so to speak, doubled in those we love; and it is by no means impossible to love

ourselves better in these others than in our actual self; and to be less sensible to the events which concern us, by reason of their immediate effect upon ourselves, than on account of their operation upon those connected with us; to feel, for example, that the most bitter part of an affliction is the pain it will cause our friends, and that the greatest charm of personal success is the pleasure we shall take in their joy. Such is the operation of sympathy. These sentiments received and paid back, increase by communication. They may be compared to mirrors, so arranged as mutually to transmit the rays of light, collect them in a common focus, and produce an increase of heat, by their reciprocal reflections. The force of these sympathies is one of the reasons which has made legislators prefer married men to bachelors, and fathers of a family to those who have no children. The law has more power over those who expose a greater surface to its operations. Such men, through an interest in the happiness of those who are to succeed them, look to the future as well as the present; while men who have not the same ties, are satisfied with a transitory possession.

With regard to the sympathy which the paternal relation produces, it may be sometimes observed to act independently of any affection. The honor acquired by the father extends to the son; the disgrace of the son spreads back to the father. The members of a family, although disunited by interest and inclination, have a common sensibility for all that appertains to the honor of each.

13th. *Antipathies.* These are the reverse of those expansive and affectionate sentiments, of which we have been speaking. It is fortunate that the sources of sympathy are constant and natural; they are found everywhere, at all times, and under all circumstances;—while antipathies are accidental, and of course transitory. They vary according to times, places, events, and persons; and they have nothing

fixed nor determinate. Still, these two principles sometimes coalesce and act together. Humanity makes us hate the inhuman; friendship renders us hostile to the adversaries of our friends; and antipathy itself becomes a cause of union between two persons who have a common enemy.

14th. *Folly, or Disorder of Mind.* Imperfections of mind may be reduced to ignorance, feebleness, irritability, and inconstancy. What is called *folly* is an extraordinary degree of imperfection, as striking to all the world as the most obvious corporal defect. It not only produces all the imperfections above mentioned, and carries them to excess; but in addition, it gives an absurd and dangerous turn to the inclinations.

The sensibility of a maniac becomes extreme upon a certain point, while in other respects, it is quite benumbed. He seems to have an excessive distrust, a hurtful malignity, a cessation of every sentiment of benevolence; he has no respect for himself nor for others; he braves all decorum and propriety; he is not insensible to fear, nor to good treatment,—he yields to firmness at the same time that mildness makes him tractable; but he has hardly any regard for the future, and can only be acted upon by immediate means.

15th. *Pecuniary circumstances.* They consist of the sum total of *means*, compared with the sum total of *wants*. Means comprise, 1st, property, that which is possessed independently of labor; 2d, the profits of labor; 3d, the pecuniary aids which we may expect from our relations and friends.

*Wants* depend upon four circumstances: 1st. Habits of expense. What is beyond these habits is superfluity, what is within them is privation. The greater part of our desires exist only in the recollection of some past enjoyment. 2d. The persons with whose support we are charged, either by the laws or by opinion,—children, poor relations, old ser-

wants. 3d. Unexpected wants. A given sum may have a much greater value at one moment than another; if it is needed, for instance, for an important lawsuit, or for a journey upon which the fate of a family depends. 4th. Expectations of a profit, of an inheritance, &c. It is evident that the hopes of fortune, in proportion to their force, are true wants; and that their loss may affect us almost as much as that of a property already in possession.

## SECTION II.

### *Secondary circumstances which affect Sensibility.*

Authors who have wished to account for differences of sensibility, have ascribed them to circumstances of which no mention has yet been made, viz., sex, age, rank, education, habitual occupations, climate, race, government, religion;—circumstances all very apparent, very easy to observe, and very convenient for explaining the different phenomena of sensibility. Still they are but secondary circumstances; I mean that, in themselves, they are not reasons; but must be explained by the circumstances described in the first section, which are here represented and combined; each secondary circumstance containing in itself many primary circumstances. As a matter of convenience, we speak of the influence of sex upon sensibility; including in that single phrase all the primary circumstances of strength, knowledge, firmness, of soul, perseverance, ideas of honor, sentiments of sympathy, &c. Do we speak of the influence of rank?—We mean by it a certain assemblage of primary circumstances; such as the degree of knowledge, ideas of honor, connections of family, habitual occupations, pecuniary circumstances. It is the same with all the others. Each of these secondary circumstances may be translated by a certain number of the primary. This distinction, though essential,



has not yet been analyzed. Let us pass to a more particular examination.

1st. *Sex.* The sensibility of women seems to be greater than that of men. Their health is more delicate. They are generally inferior in strength of body, knowledge, the intellectual faculties, and firmness of soul. Their moral and religious sensibility is more lively; sympathies and antipathies have a greater empire over them. The honor of a woman consists more in modesty and chastity; that of man in probity and courage. The religion of a woman more easily deviates towards superstition; that is, towards minute observances. Her affections for her own children are stronger during their whole life, and especially during their early youth. Women are more compassionate for those whose sufferings they see; and the very pains they take to relieve them, form a new bond of attachment. But their benevolence is locked up in a narrower circle, and is less governed by the principle of utility. It is rare that they embrace in their affections the wellbeing of their country; much less, that of mankind; and the interest which they take in a party, depends almost always upon some private sympathy. There enters into all their attachments and antipathies more of caprice and imagination; while men have more regard to personal interests, or public utility. Their habitual amusements are more quiet and sedentary. On the whole, woman is better fitted for the family, and man for matters out of doors. The domestic economy is best placed in the hands of the women; the principal management of affairs in those of the men.

2d. *Age.* Each period of life acts differently upon sensibility; but it is extremely difficult to state particulars, since the limits of the different ages vary with individuals, and, in fact, are arbitrary with regard to all. In considering infancy, adolescence, youth, maturity, decline, and decrepitude as divisions of human life, we can only speak of

them vaguely, and in general terms. The different imperfections of mind, which we have mentioned, are so striking in infancy that it needs a vigilant and constant protection. The affections of adolescence and early youth are prompt and lively, but are seldom governed by the principle of prudence. The legislator is obliged to protect this age from the errors into which the want of experience or the vivacity of the passions are apt to lead it. As to decrepitude, in many respects it is only a return to the imperfections of infancy.

3d. *Rank.* This circumstance depends so much, for its effects upon the political constitution of states, that it is almost impossible to announce any proposition with respect to it, which is universally true. In general it may be said, that the amount of sensibility is greater in the upper ranks than in the lower; the ideas of honor in particular are more predominant.

4th. *Education.* Health, strength, robustness may be referred to *physical education*; to *intellectual education* belong the amount of knowledge, its kind, and to a certain degree, firmness of soul, and perseverance; to *moral education*, appertain the bent of the inclinations, the ideas of honor and religion, the sentiments of sympathy, &c. To education in general, may be referred the habitual occupations, amusements, attachments, habits of expense, and pecuniary resources. But when we speak of education, we ought not to forget, that its influence in all these respects is so modified, either by a concurrence of external circumstances, or by natural disposition, that it is often impossible to calculate its effects.

5th. *Habitual occupations*, whether of profit, or of amusement and choice. They influence all the other causes,—health, strength, knowledge, inclinations, ideas of honor, sympathies, antipathies, fortune, &c. Thus we see common traits of character in certain professions; especially in

those which constitute a class or condition, such as ecclesiastics, soldiers, sailors, lawyers, magistrates, &c.

6th. *Climate.* Formerly too much was attributed to this cause; it has since been underrated. What renders this examination difficult, is the circumstance, that a comparison of nation with nation can only be made as to some great facts, which may be explained in different ways. It seems to be proved, that in warm climates, men are less strong, less robust; they have less need to labor, because the earth is more fertile; they are more inclined to the pleasures of love, a passion which in those latitudes manifests itself earlier, and with more ardor. All their sensibilities are quicker; their imagination is more lively; their spirit is more prompt, but less vigorous, and less persevering. Their habitual occupations announce more of indolence than of activity. They have probably at their birth a physical organization less vigorous, and a temperament of soul less firm and less constant.

7th. *Race.* A negro born in France or England is in many respects a different being from a child of the French or English race. A Spanish child born in Mexico or Peru, at the hour of its birth, is very different from a Mexican or Peruvian child. The race may perhaps have an influence upon that natural disposition, which serves as a foundation for all the rest. Afterwards, it operates much more sensibly upon the moral and religious bias, upon the sympathies and antipathies.

8th. *Government.* This circumstance exercises an influence of the same sort with that of education. The magistrate may be considered as a national instructor; and under a vigilant and attentive government, the particular preceptor, even the father himself, is but a deputy, a substitute for the magistrate, with this difference, that the authority of the father has its limit, while that of the magistrate extends through the whole life.

The influence of this cause is immense; it extends to almost every thing; in fact, it embraces every thing, except temperament, race, and climate; for even health may depend upon it, in many respects—so far as relates to regulations of police, the abundance of provisions, and the removal of apparent causes of disease. The method of education, the plan followed in the disposal of offices, and the scheme of rewards and punishments, will determine in a great measure the physical and moral qualities of a nation.

Under a government well constituted, or only well administered though with a bad constitution, it will be seen that men are generally more governed by honor; and that honor is placed in actions more conformed to public utility. Religious sensibility will be more exempt from fanaticism and intolerance, more free from superstition and servile reverence. A common sentiment of patriotism springs up. Men perceive the existence of a national interest. Enfeebled factions will see ancient rallying signs losing their power. The popular affection will be rather directed towards the magistrate, than towards the heads of a party, and towards the whole country rather than towards any thing else. Private revenge will neither be protracted, nor will it spread through society; the national taste will be directed towards useful expenses, such as voyages of discovery, the perfecting of agriculture, improvements in the sciences, and the embellishment of the country. There will be perceptible even in the productions of human genius; a general disposition to discuss with calmness important questions of public good.

9th. *Religious Profession.* We may derive from this source pretty clear indications with respect to religious sensibility; sympathy, antipathy, and the ideas of honor and virtue. In certain cases we may even judge of the intelligence, the strength or weakness of mind, and the disposition of an individual, from the sect to which he belongs. I

admit that it is common to profess in public, from motives of convenience or good breeding, religious opinions which are not very sincerely entertained. But in these cases the influence of religious profession, though weakened, is not destroyed. Early habits, the ties of society, the power of example, continue to operate even after the principle upon which they are founded, ceases to exist.

The man who at heart has ceased to be a Jew, a Quaker, an Anabaptist, a Calvinist, or a Lutheran, will still be apt to retain a partiality for those of the denomination to which he nominally belongs, and a corresponding antipathy for those of every other.

### SECTION III.

#### *Practical application of this Theory.*

We cannot calculate the motion of a vessel without knowing the circumstances which influence her sailing, such as the force of the wind, the resistance of the water, the model of the hull, the weight of the lading, &c. In like manner we cannot operate with any certainty upon a question of legislation, without considering all the circumstances which affect the sensibility.

I confine myself here to what concerns the penal code. In all its parts, a scrupulous attention to this diversity of circumstances is necessary.

1st. *To ascertain the evil of an offence.* The same nominal offence is not in fact the same real offence, when the sensibility of the injured individual is not the same. An action, for example, might be a serious insult to a woman, which to a man would be wholly indifferent. A corporal injury, which, if done to an invalid, would put his life in danger, would be of little comparative consequence to a man in full health. An imputation which might ruin the honor

or the fortune of one individual, might do no harm to another.

2d. *To give a proper satisfaction to the individual injured.* Where the sensibility is different, the same nominal satisfaction is not the same real satisfaction. A pecuniary satisfaction for an affront might be agreeable or offensive, according to the rank of the person affronted, according to his fortune, or according to prevailing prejudices. Am I insulted?—my pardon, publicly asked, would be a sufficient satisfaction on the part of my superior, or my equal; but not so on the part of my inferior.

3d. *To estimate the force of punishments and their impression upon delinquents.* When the sensibility is essentially different, the same nominal punishment is not the same real punishment. Exile is not the same thing to a young man and to an old man; to a bachelor and to the father of a family; to an artisan who has no means of subsistence out of his country, and to a rich man who would only find himself obliged to change the scene of his pleasures. Imprisonment would not be an equal punishment for a man and for a woman, for an invalid and for a person in health; for a rich man whose family would not suffer in his absence, and for one who lives only by his labor, and who would leave his children in distress.

4th. *To transplant a law from one country into another.* The same verbal law would not be the same real law, if the sensibility of the two nations was essentially different. A law on which depends the happiness of European families, transported into Asia, would become the scourge of society. Women in Europe are accustomed to enjoy liberty, and even a sort of domestic empire; women in Asia are prepared by their education for the imprisonment of the seraglio, and even for servitude. Marriage is not a contract of the same kind in Europe and in the East; and if it were

submitted to the same laws, the unhappiness of all parties would certainly ensue.

*The same punishments*, it is said, *for the same offences*. This adage has an appearance of justice and impartiality which seduces the superficial observer. To give it a reasonable sense, we must determine beforehand what is meant by the same punishments and the same offences. An inflexible law, a law which should regard neither age, nor fortune, nor rank, nor education, nor the moral and religious prejudices of individuals, would be doubly vicious, at once inefficacious and tyrannical. Too severe for one, too indulgent for another; always failing through excess or deficiency; under the appearance of equality, it conceals an inequality the most monstrous.

When a man of great wealth, and another of a moderate condition, are condemned in the same fine, is the punishment the same? Do they suffer the same evil? Is not the manifest inequality of this treatment rendered yet more odious by its delusive equality? And does not the law fail in its object; since the one may lose all his resources of living, while the other pays, and walks off in triumph? Let a robust youth and a weak old man be both condemned to wear irons for the same number of years;—a reasoner skilful in obscuring the most evident truths, might undertake to prove the equality of this punishment; but the people, who are little given to sophistry, the people, faithful to nature and to sentiment, would feel an internal murmuring of spirit at the sight of such injustice; and their indignation, changing its object, would pass from the criminal to the judge, and from the judge to the legislator.

There are some specious objections which I do not wish to dissemble. "How is it possible to take account of all the circumstances which influence the sensibility? How can we appreciate internal and secret dispositions, such as strength of mind, knowledge, inclinations, sympathies?

How can we measure these different qualities? The father of a family, in the treatment of his children, may consult these interior dispositions, these diversities of character; but a public instructor, though charged with but a limited number of pupils, cannot do it. A legislator, who has a numerous people in view, is obliged to confine himself still more to general laws; and he is bound to take care how he increases their complication by descending into particulars. If he leaves to the judges the right of varying the application of the laws according to the infinite diversity of circumstances and characters, there will be nothing to restrain them from the most arbitrary judgments. Under pretext of observing the true spirit of the legislator, the judges will make the laws an instrument of caprice or antipathy."

To all this, there needs less an answer, than an explanation; for it is rather an objection than a decisive attack. The principle is not denied; but its application is thought to be impossible.

1st. I allow that the greater part of these differences in sensibility cannot be appreciated; that it would be impossible to prove their existence in individual cases, or to measure their strength and degree. But, happily, these interior and secret dispositions have certain outward and manifest indications. These are the secondary circumstances above enumerated, viz. *sex, age, rank, race, climate, government, education, religious profession*;—palpable and evident circumstances, which represent interior dispositions.

Thus the legislator is aided as to the most difficult point. He need not trouble himself with metaphysical or moral qualities; he may confine himself to circumstances that are obvious. For example, he directs a given punishment to be modified, not in proportion to the sensibility of the criminal, his perseverance, his strength of mind, his knowledge, &c., but according to sex or age. It is true that presumptions drawn from these circumstances are liable to error. A



child of fifteen *may* have more knowledge than a man of thirty; an individual woman may have more courage or less modesty than an individual man; but these presumptions are in general just enough for the avoidance of tyrannical laws, and will be sufficient to gain for the legislator the suffrages of opinion.

2d. These secondary circumstances are not only easy to seize, but they are few in number, and they form general classes. They furnish grounds of justification, of extenuation, or of aggravation. Thus the difficulty disappears, and simplicity pervades the whole.

3d. In this there is nothing arbitrary. It is not the judge, it is the law which modifies such and such a punishment, according to the sex, the age, the religious profession. As to other circumstances of which the examination must be absolutely left to the judge, as the *more* or *less* of derangement of mind, the *more* or *less* of strength, the *more* or *less* of fortune, the legislator, who cannot decide upon individual cases, will direct the tribunals by general rules, and will leave them a certain latitude in order that they may proportion their judgment to the particular nature of the circumstances.

What is here recommended is not an utopian idea. There has scarcely been a legislator so barbarous or so stupid, as entirely to neglect the circumstances which influence sensibility. A more or less confused feeling of them has guided the establishment of civil and political rights; and more or less of regard to these circumstances has always been shown in the institution of punishments. Hence the differences which have been admitted in the case of women, children, freemen, slaves, soldiers, priests, &c.

Draco seems to have been the only penal legislator who rejected all these considerations. In his view, all crimes were equal, because they were all violations of the law. He condemned all delinquents to death, without distinction.

He confounded, he overturned all principles of human sensibility. His horrible work endured but a short time; nor is it probable that his laws were ever literally followed. Without falling into this extreme, how many faults of the same kind have been committed? I should never finish were I to cite examples. It is notorious that there have been sovereigns who have preferred to lose provinces, and to make blood flow in streams, rather than humor a particular sensibility, rather than tolerate a custom indifferent in itself, rather than respect an ancient prejudice in favor of a certain dress, or a certain form of prayer.

A prince of our times,\* active, enlightened, and animated by the desire of glory, and a wish to promote the happiness of his subjects, undertook to reform every thing in his territories; and in so doing, excited all to oppose him. On the eve of his death, recalling all the vexations he had experienced, he wished it to be inscribed upon his tomb, that he had been unfortunate in all his enterprises. It would have been well to add, for the instruction of posterity, that he had never known how to respect and to humor the prejudices, the inclinations, the sensibilities of men.

When a legislator studies the human heart; when he makes provision for the different degrees, the different kinds of sensibility, by exceptions, limitations, and mitigations, these temperaments of power charm us as a paternal condescension. It is the foundation of that approval which we give to the laws, under the names, a little vague it is true, of humanity, equity, adaptation, moderation, wisdom.

We may here discover a striking analogy between the art of the legislator and that of the physician. A catalogue of circumstances which influence sensibility, is alike necessary to these two sciences. That which distinguishes the physician from the empiric, is an attention to every thing

\* Joseph II. of Austria.

which constitutes the particular state of the individual. But it is especially in maladies of the soul, in those where the moral nature is affected, and where it is necessary to surmount injurious habits and to form new ones, that it is necessary to study every thing which influences the disposition of the patient. A single error here may change all the results, so that what were intended as remedies, may prove to be aggravations.

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## CHAPTER X.

### *Analysis of Political Good and Evil. How they are diffused through Society.*

It is with government as with medicine; its only business is, the choice of evils. Every law is an evil, for every law is an infraction of liberty. Government, I repeat it, has but the choice of evils. In making that choice, what ought to be the object of the legislator? He ought to be certain of two things: 1st, that in every case the acts which he undertakes to prevent are really evils; and 2d, that these evils are greater than those which he employs to prevent them.

He has then two things to note,—the evil of the offence, and the evil of the law; the evil of the malady, and the evil of the remedy.

An evil seldom comes alone. A portion of evil can hardly fall upon an individual, without spreading on every side, as from a centre. As it spreads, it takes different forms. We see an evil of one kind coming out of an evil of another kind; we even see evil coming out of good, and good out of evil. It is important to know and to distinguish all these kinds of evil, for in this the very essence of legislation consists. But happily, these modifications are few in number,

and their differences are strongly marked. Three principal distinctions, and two subdivisions, will be enough to solve the most difficult problems.

*Evil of the first order.*

*Evil of the second order.*

*Evil of the third order.*

*Primitive Evil—Derivative Evil.*

*Immediate Evil—Consequential Evil.*

*Extended Evil—Divided Evil.*

*Permanent Evil—Evanescent Evil.*

These are the only new terms which it will be necessary to employ to express the variety of forms which evil may take.

The evil resulting from a bad action may be divided into two principal parts: 1st. That which falls immediately upon such and such assignable individuals, I call *evil of the first order*. 2d. That which takes its origin in the first, and spreads through the entire community, or among an indefinite number of non-assignable individuals, I call *evil of the second order*.

Evil of the first order may be distinguished into two branches, viz. 1st, the *primitive evil*, which is peculiar to the individual injured, to the first sufferer, the person, for example, who is beaten or robbed; 2d, the *derivative evil*, that which falls upon certain assignable individuals, as a consequence of the primitive evil, by reason of some relation between them and the first sufferer, whether it be a relation of personal interest, or merely of sympathy.

Evil of the second order may also be distinguished into two branches: 1st, *alarm*, 2d, *danger*. Alarm is a positive pain, a pain of apprehension, the apprehension of suffering the same evil which we see has already fallen upon another. Danger is the probability that a primitive evil will produce other evils of the same kind.

These two branches of evil are closely connected, yet they

are so distinct, as to be capable of a separate existence. There may be alarm where there is no danger, there may be danger where there is no alarm. We may be frightened at a conspiracy purely imaginary; we may remain secure in the midst of a conspiracy ready to break out. But commonly, alarm and danger go together, as natural effects of the same cause. The evil that has happened, makes us anticipate other evils of the same kind, by rendering them probable. The evil that has happened, produces danger; danger produces alarm. A bad action is dangerous, as an example; it prepares the way for other bad actions,—1st, by suggesting the idea of their commission; 2d, by augmenting the force of temptation.

Let us follow the train of thought which may pass in the mind of an individual, when he hears of a successful robbery. Perhaps he did not know of this means of subsistence, or never thought of it. Example acts upon him like instruction, and gives him the first idea of resorting to the same expedient. He sees that the thing is possible, provided it be well managed; and executed by another it appears to him less difficult and less perilous than it really is. Example is a track which guides him along where he never would have dared to be the first explorer. Such an example has yet another effect upon him, not less remarkable. It weakens the strength of the motives which restrain him. The fear of the laws loses a part of its force so long as the culprit remains unpunished; the fear of shame diminishes in the same degree, because he sees accomplices who afford him an assurance against the misery of being utterly despised. This is so true, that wherever robberies are frequent and unpunished, they are as little a matter of shame as any other means of acquisition. The early Greeks had no scruples about them; they are gloried in by the Arabs of the present day.

Let us apply this theory. You have been beaten, wound-

ed, insulted and robbed. The amount of your personal sufferings, so far as they relate to you alone, forms the *primitive evil*. But you have friends; and sympathy makes them share your pains. You have a wife, children, parents; a part of the indignity which you have suffered, of the affront to which you have been subjected, falls upon them. You have creditors; and the loss you have experienced obliges them to wait. All these persons suffer a less or greater evil, *derivative* from yours; and these two portions of evil, yours and theirs, compose together the *evil of the first order*.

But this is not all. The news of the robbery, with all its circumstances, spreads from mouth to mouth. An idea of *danger* springs up, and *alarm* along with it. This alarm is greater or less, according to what is known of the character of the robbers, of the personal injuries they have inflicted, of their means, and their number; according as we are near the place or distant from it; according to our strength and courage; according to our peculiar circumstances, such as travelling alone, or with a family, carrying little money with us, or being entrusted with valuable effects. This danger and alarm constitute the *evil of the second order*.

If the evil which has been done to you is of a nature to spread of itself,—for example, if you have been defamed by an imputation which envelopes a class of individuals more or less numerous, it is no longer an evil simply private, it becomes an *extended evil*. It is augmented in proportion to the number of those who participate in it.

If the money of which you were robbed did not belong to you, but to a society, or to the state, the loss would be a *divided evil*. This case differs from the former in the important circumstance, that here, the evil is diminished in proportion to the number among whom it is shared.

If, in consequence of the wound you have received, you suffer an additional evil distinct from the first, such as the

abandonment of a lucrative business, the loss of a marriage, or the failure to obtain a profitable situation, that is a *consequential* evil. A *permanent* evil is that which, once done, cannot be remedied, such as an irreparable personal injury, an amputation, death, &c. An *evanescent* evil is that which may pass away altogether, such as a wound which may be healed, or a loss which may be entirely made up.

These distinctions, though partly new, are far from being useless subtilities. It is only by their means that we can appreciate the difference of malignity in different offences, and regulate accordingly the proportion of punishment.

This analysis will furnish us a moral *criterion*, a means of decomposing human actions, as we decompose the mixed metals, in order to discover their intrinsic value, and their precise quantity of alloy.

If among bad actions, or those reputed to be so, there are some which cause no alarm, what a difference between these actions and those which do cause it! The primitive evil affects but a single individual; the derivative evil can extend only to a small number; but the evil of the second order may embrace the whole of society. Let a fanatic commit an assassination on account of what he calls heresy, and the evil of the second order, especially the alarm, may exceed many million times the evil of the first order.

There is a great class of offences of which the entire evil consists in danger. I refer to those actions which, without injuring any particular individual, are injurious to society at large. Let us take, for an example, an offence against justice. The bad conduct of a judge, of an accuser, or a witness, causes a criminal to be acquitted. Here is doubtless an evil, for here is a danger; the danger that impunity will harden the offender, and excite him to the commission of new crimes; the danger of encouraging other offenders by the example and the success of the first. Still, it is probable that this danger, great as it is, will escape the attention of

the public, and that those who by the habit of reflection are capable of perceiving it, will not derive from it any alarm. They do not fear to see it realized upon any body.

But the importance of these distinctions can only be perceived in their development. We shall presently see a particular application of them.

If we carry our views still further, we shall discover another evil, which may result from an offence. When the alarm reaches a certain point, and lasts a long time, the effect is not limited to the passive faculties of man; it extends to his active faculties; it deadens them; it throws them into a state of torpor and decrepitude. Thus, when vexations and depredations have become habitual, the discouraged laborer only works to save himself from starvation; he seeks in idleness the only consolation which his misfortunes allow; industry fails with hope, and brambles gain possession of the most fertile fields. This branch of evil is the *evil of the third order*.

Whether an evil happens by human agency, or whether it results from an event purely physical, all these distinctions are equally applicable.

Happily, this power of propagation and of diffusion does not appertain to evil only. Good has the same prerogatives. Follow an analogous division, and you will see coming out of a good action, a *good of the first order*, divisible into primitive and derivative; and a *good of the second order*, which produces a certain degree of confidence and security.

The *good of the third order* is manifested in that energy, that gayety of heart, that ardor of action, which remuneratory motives alone inspire. Man, animated by this sentiment of joy, finds in himself a strength which he did not suspect.

The propagation of good is less rapid and less sensible than that of evil. The seed of good is not so productive in hopes as the seed of evil is fruitful in alarms. But this difference is abundantly made up, for good is a necessary



result of natural causes which operate always; while evil is produced only by accident, and at intervals.

Society is so constituted that in laboring for our particular good, we labor also for the good of the whole. We cannot augment our own means of enjoyment without augmenting also the means of others. Two nations, like two individuals, grow rich by a mutual commerce; and all exchange is founded upon reciprocal advantages.

It is fortunate also that the effects of evil are not always evil. They often assume the contrary quality. Thus, juridical punishments applied to offences, although they produce an evil of the first order, are not generally regarded as evils, because they produce a good of the second order. They produce alarm and danger;—but for whom? Only for a class of evil-doers, who are voluntary sufferers. Let them obey the laws, and they will be exposed neither to danger nor alarm.

We should never be able to subjugate, however imperfectly, the vast empire of evil, had we not learned the method of combatting one evil by another. It has been necessary to enlist auxiliaries among pains, to oppose other pains which attack us on every side. So in the art of curing pains of another sort, poisons well applied, have proved to be remedies.

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## CHAPTER XI.

### *Reasons for erecting certain Acts into Offences.*

WE have made an analysis of evil. That analysis shows us that there are acts from which there results more of evil than of good. It is acts of this nature, or at least acts reputed to be such, that legislators have prohibited. A prohibited act is what we call an *offence*. To cause these

prohibitions to be respected, it is necessary to establish *punishments*.

But is it necessary to erect certain acts into offences? or, in other words, is it necessary to subject them to legal punishments?

What a question! Is not all the world agreed on this matter? Why seek to prove a truth universally acknowledged, and so firmly rooted in the minds of men?

Doubtless, all the world is agreed upon this matter. But on what is their agreement founded? Ask his reasons of every man who assents, and you will see a strange diversity of sentiments and principles; and that, not only among the people, but among philosophers. Will it be a waste of time to seek out some uniform basis of consent upon a subject so important?

The agreement which actually exists, is only founded upon prejudices, which vary according to times and places, customs and opinions. I have always been told that such an action is a crime, and I think that it is so;—such is the guide of the people, and even of legislators. But if usage has erected innocent actions into crimes; if it has made trifling offences to be considered as grave ones, and grave ones as trifling; if it has varied everywhere; it is plain that usage ought to be subjected to some rule, and ought not to be taken as a rule itself. Let us appeal then to the principle of utility. It will confirm the decrees of prejudice when they are just; it will annul them when they are wrong.

I suppose myself a stranger to all the common appellations of vice and virtue. I am called upon to consider human actions only with relation to their good or bad effects. I open two accounts; I pass to the account of pure profit, all the pleasures; I pass to the account of loss, all the pains. I faithfully weigh the interests of all parties. The man whom prejudice brands as vicious, and he whom it extols

as virtuous, are for the moment, equal in my eyes. I wish to judge prejudice itself; to weigh all actions in a new balance, in order to form a catalogue of those which ought to be permitted, and of those which ought to be forbidden. This operation, which appears at first so complicated, is rendered easy by the distinction between evils of the first, second, and third orders.

Am I to examine an act which attacks the security of an individual? I compare all the pleasure, or, in other words, all the profit, which results to the author of the act, with all the evil, or all the loss, which results to the party injured. I see at once, that the evil of the first order surpasses the good of the first order. But I do not stop there. The action under consideration produces throughout society, danger and alarm. The evil which at first was only individual, spreads everywhere, under the form of fear. The pleasure resulting from the action belongs solely to the actor; the pain reaches a thousand,—ten thousand,—all. This disproportion already prodigious, appears infinite, upon passing to the evil of the third order, and considering that if the act in question is not suppressed, there will result from it a universal and durable discouragement, a cessation of labor, and at last, the dissolution of society.

I will now run through the strongest of our desires, those whose satisfaction is accompanied with the greatest pleasures, and we shall see that when brought about at the expense of security, their gratification is much more fertile in evil than in good.

I. In the first place, let us consider the passion of *hatred*. This is the most fruitful cause of assaults upon the honor and the person. I have conceived, no matter why, an enmity against you. Passion bewilders me. I insult you; I humble you; I wound you. The sight of your pain makes me experience, at least for a time, a feeling of pleasure. But even for that time, can it be believed that the

pleasure which I taste is equivalent to the pain you suffer? If every atom of your pain separately painted itself in my soul, is it probable that each corresponding atom of my pleasure would appear to have an equal intensity? In fact, only some scattering atoms of your pain present themselves to my troubled and disordered imagination. For you, none is lost; for me, the greater part is completely thrown away. But this pleasure, such as it is, soon betrays its natural impurity. Humanity, a principle not to be entirely quenched even in the most savage souls, wakes up a secret remorse. Fears of every kind, the fear of vengeance on your part, or on the part of those connected with you, fear of public disapprobation, and if any sparks of religion are left to me, religious fears, fears of all kinds, come to trouble my security, and to disturb my triumph. Passion has died away, the pleasure of its gratification vanishes; and an inward reproach succeeds. But on your side, the pain still continues, and may have a long duration. This is the case even with trifling wounds which time may cicatrize. How will it be when the injury is incurable in its nature?—when limbs have been maimed, features disfigured, or faculties destroyed? Weigh the evils,—their intensity, their duration, their consequences; measure them under all their dimensions, and you will see that in every sense, the pleasure is inferior to the pain.

Let us now pass to the effects of the second order. The news of your misfortune instils the poison of fear into every soul. Every man who has an enemy, or who may have an enemy, contemplates with terror what the passion of hate may inspire. Among feeble beings, who have so much to dispute about, and so many causes of mutual envy, among whom a thousand little rivalries excite as many causeless hostilities, the spirit of revenge holds forth a succession of endless evils.

Thus, every act of cruelty produced by a passion, the

principle of which exists in every heart, and from which every body is exposed to suffer, creates an alarm, which will continue until the punishment of the culprit has transferred the danger to the side of injustice, and of cruel enmity. This alarm is a suffering common to all; and there is another suffering resulting from it, which we ought not to forget,—that pain of sympathy felt by generous hearts at the sight of such aggressions.

II. If we examine the actions which may spring from that imperious motive, that desire to which nature has intrusted the perpetuation of the species, we shall see that when it attacks the security of the person, or of the domestic condition, the good which results from its gratification, cannot be compared to the evil it produces.

I speak here only of that attack which manifestly compromises the security of the person, viz. ravishment. It is useless by a gross and puerile pleasantry to deny the existence of this crime, or to diminish the horror of it. Whatever may be said, it is certain that women the most prodigal of their favors, do not love to have them snatched by a brutal fury. But in this case, the greatness of the alarm renders all discussion of the primitive evil unnecessary. However it may be of the actual offence, the possible offence will always be an object of terror. The more universal the desire which gives rise to this offence, the greater and more violent is the alarm. In times when the laws have not had sufficient power to repress it, when manners have not been sufficiently regulated to brand it, it produced acts of vengeance of which history has preserved the recollection. Whole nations have interested themselves in the quarrel; and hatreds originating in this source, have been transmitted from fathers to their children. It is possible that the close confinement of women, unknown among the Greeks in the time of Homer, owes its origin to an epoch of troubles and revolutions, when the feebleness of

the laws had multiplied disorders of this kind, and spread a general terror.

III. With respect to the motive of *cupidity*,—if we compare the pleasure of acquiring by a violation of another's rights, with the pain which such a proceeding occasions, they will not prove to be equivalents. It is true there are cases in which, if we confine ourselves to the effects of the first order, the good will have an incontestable preponderance over the evil. Were the offence considered only under this point of view, it would not be easy to assign any good reasons to justify the rigor of the laws. —Every thing depends upon the evil of the second order; it is this which gives to such actions the character of crime, and which makes punishment necessary. Let us take for example the physical desire of satisfying hunger. Let a beggar, pressed by hunger, steal from a rich man's house a loaf, which perhaps saves him from starving,—can it be possible to compare the good which the thief acquires for himself, with the evil which the rich man suffers? The same is true of less striking examples. Let a man pillage the public treasury; he enriches himself and empoverishes nobody. The wrong which he does to individuals is reduced to impalpable parts. It is not on account of the evil of the first order, that it is necessary to erect these actions into offences, but on account of the evil of the second order.

If the pleasure which attends the satisfaction of such powerful desires as hatred, the sexual appetite, and hunger, when that satisfaction runs counter to the interests of others, is not equal to the pain which it causes, the disproportion will appear much greater, as respects motives less active and strong.

The desire of self-preservation is the only one beside, which seems to demand a separate examination.

If the question relates to an evil which the laws themselves seek to impose upon an individual;—this can only

be for some very pressing reason, such as the necessity of carrying into execution punishments ordained by the tribunals, punishments without which there would be no security and no government. Now, if the desire of escaping an evil of this sort be gratified, the law, to the same extent, will be rendered inefficient. It appears then that the evil resulting from this satisfaction, is that which results from the inefficiency of the laws, or what amounts to the same thing, from the non-existence of laws. But the evil which results from the non-existence of laws, is, in fact, an assemblage of all the different evils which the laws are established to prevent; that is to say, of all the evils which men are liable to experience on the part of other men. It is true that a single triumph over the laws, obtained in this way, by an individual, is not sufficient to shake the whole system; nevertheless, every example of this kind is a symptom of weakness,—a step towards destruction. There results then from it an evil of the second order; an alarm, at least a danger; and if the laws connive at this evasion, they will do it in contradiction to their own aim. In order to escape one evil they will admit another, much more than its equivalent.

There remains the case in which an individual repels an evil, to which the laws have not chosen to subject him. If they have not chosen to subject him to it, they do not wish him to submit to it. To repel this evil, is itself a good. It is possible that in making efforts to preserve himself from it, the individual in question may do an evil more than equivalent to this good. Is the evil he does in his own defence, confined to what is necessary for that object, or does it go beyond? What is the proportion of the evil which he does, to the evil he avoids? Is it equal, greater, or less? Would the evil he has avoided, have been susceptible of compensation, if, instead of defending himself by a method so costly, he had preferred to submit to it, for a

time? These are questions of fact, which the law ought to take into consideration, before establishing in detail the regulations of self-defence. It is a subject which belongs to that part of the penal code which treats of the means of justification or extenuation, in regard to offences committed. It is sufficient to observe here, that in all these cases, though there is in fact an evil of the first order, yet all the evil which an individual may do in self-defence, produces no alarm and no danger. Other men have nothing to fear, unless they first commence an illegal attack.

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## CHAPTER XII.

### *The limits which separate Morals from Legislation.*

MORALITY in general, is the art of directing the actions of men in such a way as to produce the greatest possible sum of good.

Legislation ought to have precisely the same object.

But although these two arts, or rather sciences, have the same end, they differ greatly in extent. All actions, whether public or private, fall under the jurisdiction of morals. It is a guide, which leads the individual, as it were, by the hand, through all the details of his life, all his relations with his fellows. Legislation cannot do this; and if it could, it ought not to exercise a continual interference and dictation over the conduct of men.

Morality commands each individual to do all that is advantageous to the community, his own personal advantage included. But there are many acts useful to the community which legislation ought not to command. There are also many injurious actions which it ought not to forbid,



although morality does so. In a word, legislation has the same centre with morals, but it has not the same circumference.

There are two reasons for this difference: 1st. Legislation can have no direct influence upon the conduct of men, except by punishments. Now these punishments are so many evils, which are not justifiable except so far as there results from them a greater sum of good. But in many cases in which we might desire to strengthen a moral precept by a punishment, the evil of the punishment would be greater than the evil of the offence. The means necessary to carry the law into execution, would be of a nature to spread through society, a degree of alarm more injurious than the evil intended to be prevented.

2d. Legislation is often arrested by the danger of overwhelming the innocent, in seeking to punish the guilty. Whence comes this danger? From the difficulty of defining an offence, and giving a clear and precise idea of it. For example, hard-heartedness, ingratitude, perfidy and other vices which the popular sanction punishes, cannot come under the power of the law, unless they are defined as exactly as theft, homicide, or perjury.

But the better to distinguish the true limits of morals and legislation, it will be well to refer to the common classification of moral duties.

Private morality regulates the actions of men either in that part of their conduct in which they alone are interested, or in that which may affect the interests of others. The actions which affect a man's individual interest, compose a class called, perhaps improperly, *duties to ourselves*; and the quality or disposition, manifested in the accomplishment of those duties, receives the name of *prudence*. That part of conduct which relates to others, composes a class of actions, called *duties to others*. Now there are two ways of consulting the happiness of others; the one negative;

abstaining from diminishing it; the other positive, laboring to augment it. The first constitutes *probity*; the second is *beneficence*.

Morality upon these three points, needs the aid of the law; but not in the same degree, nor in the same manner.

I. The rules of prudence are almost always sufficient of themselves. If a man fails in what regards his particular private interest, it is not his will which is in fault, it is his understanding. If he does wrong, it can only be through mistake. The fear of hurting himself is a motive of repression sufficiently strong; it would be useless to add to it the fear of an artificial pain.

Does any one object, that facts show the contrary? That excesses of play, those of intemperance, the illicit intercourse between the sexes, attended so often by the greatest dangers, are enough to prove that individuals have not always sufficient prudence to abstain from what hurts them?

Confining myself to a general reply, I answer in the first place, that in the greater part of these cases, punishment would be so easily eluded, that it would be inefficacious; secondly, that the evil produced by the penal law would be much beyond the evil of the offence.

Suppose, for example, that a legislator should feel himself authorized to undertake the extirpation of drunkenness and fornication, by direct laws. He would have to begin by a multitude of regulations. The first inconvenience would therefore be, a complexity of laws. The easier it is to conceal these vices, the more necessary it would be to resort to severity of punishment, in order to destroy by the terror of examples, the constantly recurring hope of impunity. This excessive rigor of laws forms a second inconvenience not less grave than the first. The difficulty of procuring proofs would be such, that it would be necessary to encourage informers, and to entertain an

army of spies. This necessity forms a third inconvenience greater than either of the others. Let us compare the results in good and evil. Offences of this nature, if that name can be properly given to imprudences, produce no alarm; but the pretended remedy would spread an universal terror; innocent or guilty, every one would fear for himself or his connexions; suspicions and accusations would render society dangerous; we should fly from it; we should involve ourselves in mystery and concealment; we should shun all the disclosures of confidence. Instead of suppressing one vice, the laws would produce other vices, new and more dangerous.

It is true that example may render certain excesses contagious; and that an evil which would be almost imperceptible, if it acted only upon a small number of individuals, may become important by its extent. All that the legislator can do in reference to offences of this kind, is, to submit them to some slight punishment in cases of scandalous notoriety. This will be sufficient to give them a taint of illegality, which will excite the popular sanction against them.

It is in cases of this kind that legislators have governed too much. Instead of trusting to the prudence of individuals, they have treated them like children, or slaves. They have suffered themselves to be carried away by the same passion which has influenced the founders of religious orders, who, to signalize their authority, and through a littleness of spirit, have held their subjects in the most abject dependence, and have traced for them, day by day, and moment by moment, their occupations, their food, their rising up, their lying down, and all the petty details of their life. There are celebrated codes, in which are found a multitude of clogs of this sort; there are useless restraints upon marriage; punishments decreed against celibacy; sumptuary laws regulating the fashion of dress, the expense

of festivals, the furniture of houses and the ornaments of women ; there are numberless details about aliments permitted or forbidden ; about ablutions of such or such a kind ; about the purifications which health or cleanliness require ; and a thousand similar puerilities, which add to all the inconvenience of useless restraint, that of besotting the people, by covering these absurdities with a veil of mystery, to disguise their folly.

Yet more unhappy are the states, in which it is attempted to maintain by penal laws, an uniformity of religious opinions. The choice of their religion ought to be referred entirely to the prudence of individuals. If they are persuaded that their eternal happiness depends upon a certain form of worship, or a certain belief, what can a legislator oppose to an interest so great ? It is not necessary to insist upon this truth ; it is generally acknowledged ; but in tracing the boundaries of legislation, I cannot forget those which it is the most important not to overstep.

As a general rule, the greatest possible latitude should be left to individuals, in all cases in which they can injure none but themselves,—for they are the best judges of their own interests. If they deceive themselves, it is to be supposed that the moment they discover their error, they will alter their conduct. The power of the law need interfere only to prevent them from injuring each other. It is there, that restraint is necessary ; it is there, that the application of punishments is truly useful, because the rigor exercised upon an individual, becomes in such a case the security of all.

II. It is true that there is a natural connection between prudence and probity ; for our own interest well understood, will never leave us without motives to abstain from injuring our fellows.

Let us stop a moment at this point. I say, that independently of religion and the laws, we always have some

natural motives, that is, motives derived from our own interest, for consulting the happiness of others : 1st. The motive of pure benevolence, a sweet and calm sentiment which we delight to experience, and which inspires us with a repugnance to be the cause of suffering. 2d. The motives of private affection, which exercise their empire in domestic life, and within the particular circle of our intimacies. 3d. The desire of good repute, and the fear of blame. This is a sort of calculation of trade. It is paying, to have credit; speaking truth, to obtain confidence; serving, to be served. It is thus we must understand that saying of a wit, *that if there were no such thing as honesty, it would be a good speculation to invent it, as a means of making one's fortune.*

A man enlightened as to his own interest, will not indulge himself in a secret offence, through fear of contracting a shameful habit which sooner or later will betray him ; and because the having secrets to conceal from the prying curiosity of mankind, leaves in the heart a sediment of disquiet, which corrupts every pleasure. All he can acquire at the expense of security, cannot make up for the loss of that ; and if he desires a good reputation, the best guarantee he can have for it, is his own esteem.

But in order that an individual should perceive this connection between the interests of others and his own, he needs an enlightened spirit, and a heart free from seductive passions. The greater part of men have neither sufficient light, sufficient strength of mind, nor sufficient moral sensibility to place their honesty above the aid of the laws. The legislator must supply the feebleness of this natural interest, by adding to it an artificial interest, more steady and more easily perceived.

More yet. In many cases, morality derives its existence from the law ; that is, to decide whether the action is morally good or bad, it is necessary to know whether the laws

permit or forbid it. It is so of what concerns property. A manner of selling or acquiring, esteemed dishonest in one country, would be irreproachable in another. It is the same with offences against the state. The state exists only by law; and it is impossible to say what conduct in this behalf morality requires of us, before knowing what the legislator has decreed. There are countries where it is an offence to enlist into the service of a foreign power, and others in which such a service is lawful and honorable.\*

III. As to beneficence, some distinctions are necessary. The law may be extended to general objects, such as the care of the poor; but for details, it is necessary to depend upon private morality. Beneficence has its mysteries, and loves best to employ itself upon evils so unforeseen or so secret, that the law cannot reach them. Besides, it is to individual free-will that benevolence owes its energy. If the same acts were commanded, they would no longer be benefits, they would lose their attraction and their essence. It is morality, and especially religion, which here form the necessary complement to legislation, and the sweetest tie of humanity.

However, instead of having done too much in this respect, legislators have not done enough. They ought to erect into an offence, the refusal or the omission of a service of humanity when it would be easy to render it, and when some distinct ill clearly results from the refusal; such, for example, as abandoning a wounded man in a solitary road,

\* Here we touch upon one of the most difficult of questions. If the law is not what it ought to be; if it openly combats the principle of utility; ought we to obey it? Ought we to violate it? Ought we to remain neuter between the law which commands an evil, and morality which forbids it? The solution of this question involves considerations both of prudence and benevolence. We ought to examine if it is more dangerous to violate the law than to obey it; we ought to consider, whether the probable evils of obedience are less or greater than the probable evils of disobedience.

without seeking any assistance for him; not giving information to a man who is ignorantly meddling with poisons; not reaching out the hand to one who has fallen into a ditch from which he cannot extricate himself;—in these, and other similar cases, could any fault be found with a punishment, exposing the delinquent to a certain degree of shame, or subjecting him to a pecuniary responsibility for the evil which he might have prevented?

I will add, that legislation might be extended further than it is, in relation to the interests of the inferior animals. I do not approve the laws of the Hindus on this subject. There are good reasons why animals should serve for the nourishment of man, and for destroying those which incommode us. We are the better for it, and they are not the worse; for they have not, as we have, long and cruel anticipations of the future; and the death which they receive at our hands, may always be rendered less painful than that which awaits them in the inevitable course of nature. But what can be said to justify the useless torments they are made to suffer; the cruel caprices which are exercised upon them? Among the many reasons which might be given for making criminal such gratuitous cruelties, I confine myself to that which relates to my subject. It is a means of cultivating a general sentiment of benevolence, and of rendering men more mild; or at least of preventing that brutal depravity, which, after fleshing itself upon animals, presently demands human suffering to satiate its appetite.\*

\* See *Barrow's Voyage to the Cape of Good Hope*, for the cruelties of the Dutch settlers toward their cattle and their slaves.

## CHAPTER XIII.

*False methods of Reasoning on the subject of Legislation.*

It has been the object of this introduction to give a clear idea of the principle of utility, and of the method of reasoning conformable to that principle. There results from it a legislative logic, which can be summed up in a few words. What is it, to offer a *good reason* with respect to a law? It is, to allege the good or evil which the law tends to produce; so much good, so many arguments in its favor; so much evil, so many arguments against it; remembering all the time, that good and evil are nothing else than pleasure and pain.

What is it to offer a *false reason*? It is, the alleging for or against a law, something else than its good or evil effects.

Nothing can be more simple, yet nothing is more new. It is not the principle of utility which is new; on the contrary, that principle is necessarily as old as the human race. All the truth there is in morality, all the good there is in the laws, emanates from it; but utility has often been followed by instinct, while it has been combatted by argument. If in books of legislation, it throws out some sparks here and there, they are quickly extinguished in the surrounding smoke. BECCARIA is the only writer who deserves to be noted as an exception; yet even in his work, there is some reasoning drawn from false sources.

It is upwards of two thousand years, since Aristotle undertook to form, under the title of *Sophisms*, a complete catalogue of the different kinds of false reasoning. This catalogue, improved by the information which so long an interval might furnish, would here have its place and its



use. But such an undertaking would carry me too far. I shall be content with presenting some heads of error, on the subject of legislation. By means of such a contrast, the principle of utility will be put into a clearer light.

1. *Antiquity is not a reason.*

The antiquity of a law may create a prejudice in its favor; but in itself, it is not a reason. If the law in question has contributed to the public good, the older it is, the easier it will be to enumerate its good effects, and to prove its utility by a direct process.

2. *The authority of religion is not a reason.*

Of late, this method of reasoning has gone much out of fashion, but till recently, its use was very extensive. The work of Algernon Sidney is full of citations from the *Old Testament*; and he finds there the foundation of a system of Democracy, as Bossuet had found the principles of absolute power. Sidney wished to combat the partisans of divine right and passive obedience, with their own weapons.

If we suppose that a law emanates from the Deity, we suppose that it emanates from supreme wisdom, and supreme bounty. Such a law then can only have for its object, the most eminent utility; and this utility put into a clear light, will always be an ample justification of the law.

3. *Reproach of innovation is not a reason.*

To reject innovation is to reject progress: in what condition should we be, if that principle had been always followed? All which exists has had a beginning; all which is established has been innovation. Those very persons who approve a law to-day because it is ancient, would have opposed it as new, when it was first introduced.

4. *An arbitrary definition is not a reason.*

Nothing is more common among jurists and political

writers, than to base their reasonings, and even to write long works, upon a foundation of purely arbitrary definitions. This artifice consists in taking a word in a particular sense, foreign from its common usage; in employing that word as no one ever employed it before; and in puzzling the reader by an appearance of profoundness and of mystery.

Montesquieu himself has fallen into this fault in the very beginning of his work. Wishing to give a definition of law, he proceeds from metaphor to metaphor; he brings together the most discordant objects—the divinity, the material world, superior intelligences, beasts, and men. We learn at last, that *laws are relations; and eternal relations*. Thus the definition is more obscure than the thing to be defined. The word *law*, in its proper sense, excites in every mind a tolerably clear idea, the word *relation* excites no idea at all. The word *law*, in its figurative sense, produces nothing but equivocations; and Montesquieu, who ought to have dissipated the darkness, has only increased it.

It is the character of a false definition, that it can only be employed in a particular way. That author, a little further on, (ch. iii.) gives another definition. *Law in general*, he says, *is human reason, in so far as it governs all the people of the earth*. These terms are more familiar; but no clear idea results from them. Is it the fact, that so many laws contradictory, ferocious, or absurd, and in a perpetual state of change, are always *human reason*? It would seem that reason, so far from being the law, is often in opposition to it.

This first chapter of Montesquieu has given occasion to an abundance of nonsense. The brain has been racked in search of metaphysical mysteries, where none in fact, exist. Even Beccaria has suffered himself to be carried away by this obscure notion of *relations*. To interrogate a man in order to know whether he is innocent or guilty, is to force him, he tells us, to accuse himself. To this procedure he

objects; and why? because, as he says, it is *to confound all relations*.\* But what does that mean? To enjoy; to suffer; to cause enjoyment; to cause suffering; those are expressions which I understand; but to follow relations and to confound relations, is what I do not understand at all. These abstract terms do not excite any idea in my mind; they do not awaken any sentiment. I am absolutely indifferent about *relations*;—*pleasures* and *pains* are what interest me.

Rousseau has not been satisfied with the definition of Montesquieu. He has given his own, which he announces as a great discovery. *Law*, he says, *is the expression of the general will*. There are then no laws except where the people have spoken in a body. There is no law, except in an absolute democracy. Rousseau has suppressed, by this supreme decree, all existing laws; and at the same time, he has deprived of the possibility of existence, all those which are likely to be made hereafter,—the legislation of the republic of San. Marino, alone excepted.

##### 5. *Metaphors are not reasons.*

I mean either metaphor properly so called, or allegory, used at first for illustration or ornament, but afterwards made the basis of an argument.

Blackstone, so great an enemy of all reform, that he has gone so far as to find fault with the introduction of the English language into the reports of cases decided by the courts, has neglected no means of inspiring his readers with the same prejudice. He represents the law† as a castle, as a fortress, which cannot be altered without being weakened. I allow that he does not advance this metaphor as an argument; but why does he employ it? To gain possession of the imagination; to prejudice his readers against every idea of reform; to excite in them an artificial fear of

\* Beccaria, ch. xii.

† 3 Comm. ch. xvii.

all innovation in the laws. There remains in the mind a false image, which produces the same effect with false reasoning. He ought to have recollected that this allegory might be employed against himself. When they see the law turned into a castle, is it not natural for ruined suitors to represent it as a castle inhabited by robbers?

A man's house, say the English, is his castle. This poetical expression is certainly no reason,—for if a man's house be his castle by night, why not by day? If it is an inviolable asylum for the owner, why is it not so for every person whom he chooses to receive there? The course of justice is sometimes interrupted in England, by this puerile notion of liberty. Criminals seem to be looked upon like foxes; they are suffered to have their burrows, in order to increase the sports of the chase.

A church in Catholic countries, is the *House of God*. This metaphor has served to establish asylums for criminals. It would be a mark of disrespect for the Divinity to seize by force, those who had taken refuge in his house.

*The balance of trade* has produced a multitude of reasonings founded upon metaphor. It has been imagined that in the course of mutual commerce, nations rose and sank, like the scales of a balance loaded with unequal weights; people have been terribly alarmed at what appeared to them a want of equilibrium, for it has been supposed, that what one nation gained, the other must lose; as if a weight had been transferred from one scale to the other.

The word *mother-country* has produced a great number of prejudices and false reasonings, in all questions concerning colonies and the parent state. Duties have been imposed upon colonies, and they have been accused of offences, founded solely upon the metaphor of their filial dependence.

#### 6. *A fiction is not a reason.*

I understand by fiction an assumed fact notoriously false, upon which one reasons as if it were true.

The celebrated Cocceiji, the compiler of the *Code Frederic*, furnishes an example of this kind of reasoning on the subject of last wills. After a deal of circumlocution about the natural right, he decides that the legislator ought to grant to individuals the power of making a will. Why? *Because the heir and the deceased are one and the same person, and consequently the heir ought to continue to enjoy the property of the deceased.* (*Code Fred.* part ii. l. 110, p. 156.) He offers, it is true, some arguments which involve, to a small extent, the principle of utility, but that is in the preface. The serious reason, the judicial reason, is, the identity of the living and the dead!

The English lawyers, to justify the confiscation of property in certain cases, have employed a style of reasoning not unlike that of the chancellor of the great Frederic. They have imagined a *corruption of blood*, which arrests the course of legal succession. A man has been capitally punished for the crime of high treason; his innocent son is not only deprived of his father's goods, but he cannot even inherit from his grandfather, because the channel by which the goods ought to pass, has been corrupted. This fiction of a sort of political original sin, serves as a foundation to all this point of law. But why stop there? If in fact the father's blood is corrupted, why not destroy the vile offspring of corruption? Why not execute the son at the same time with the father?

Blackstone, in the seventh chapter of his first book, in speaking of the royal authority, has given himself up to all the puerility of fiction. The king, he tells us, is everywhere present; he can do no wrong; he is immortal.

These ridiculous paradoxes, the fruits of servility, so far from furnishing just ideas of the prerogatives of royalty, only serve to dazzle; to mislead; and to give to reality itself an air of fable and of prodigy. But these fictions are not mere sparkles of imagination. He makes them the

foundation of many reasonings. He employs them to explain certain royal prerogatives, which might be justified by very good arguments, without perceiving how much the best cause is injured by attempting to prop it up by falsehoods. *The judges*, he tells us, *are mirrors, in which the image of the king is reflected.* What puerility! Is it not exposing to ridicule the very objects which he designs to render the most respectable?

But there are fictions more bold, and more important, which have played a great part in politics, and which have produced celebrated works: these are. *contracts.*

The *Leviathan* of Hobbes, a work now-a-days but little known and detested through prejudice and at second hand, as a defence of despotism, is an attempt to base all political society upon a pretended contract between the people and the sovereign. The people by this contract, have renounced their natural liberty, which produced nothing but evil; and have deposited all power in the hands of the prince. All opposing wills have been united in his; or rather, annihilated by it. That which he *wills*, is taken to be the will of all his subjects. When David brought about the destruction of Uriah, he acted in that matter with Uriah's consent; for Uriah had consented to all that David might command. The prince, according to this system, might sin against God, but he could not sin against man; because all his actions proceeded from the general consent. It was impossible to entertain the idea of resisting him; because such an idea implied the contradiction of resisting one's self.

Locke, whose name is as dear to the friends of liberty as that of Hobbes is odious, has also fixed the basis of government upon a contract. He agrees that there is a contract between the prince and the people; but according to him, the prince takes an engagement to govern according to the laws, and for the public good; while the people, on their

side, take an engagement of obedience so long as the prince remains faithful to the conditions in virtue of which he receives the crown.

Rousseau rejects with indignation the idea of this bilateral contract between the prince and the people. He has imagined a *social contract*, by which all, are bound to all; and which is the only legitimate basis of government. Society exists only by virtue of this free convention of associates.

These three systems so directly opposed, agree however in beginning the theory of politics with a fiction; for these three contracts are equally fictitious. They exist only in the imagination of their authors. Not only we find no trace of them in history, but everywhere, we discover proofs to the contrary.

The contract of Hobbes is a manifest falsehood. Despotism has everywhere been the result of violence and of false religious ideas. If a people can be found which by a public act has surrendered up the supreme authority to its chief, it is not true that in so doing, that people submitted itself to all the caprices, however strange or cruel, of its sovereign. The singular act of the Danish people in 1660, includes essential clauses which limit the supreme power.

The *social contract* of Rousseau has not been judged so severely, because men are not difficult about the logic of a system which establishes that which they best love,—liberty and equality. But where has this universal convention been formed? What are its clauses? In what language is it written? Why has it always been unknown? Upon coming out of the forests, upon renouncing savage life, what tribe has possessed those great ideas of morals and politics upon which this primitive convention is built?

The contract of Locke is more specious, because, in fact, there are some monarchies, in which the sovereign takes certain engagements upon his accession to the throne; and

accepts certain conditions upon the part of the nation he is to govern.

However, even this contract is but a fiction. The essence of a contract consists in the free consent of the parties interested. It supposes that all the objects of the engagement are specified and known. Now if the prince is free, at his accession, to accept or to refuse, are the people equally so? Can a few vague acclamations be counted as an act of individual and universal assent? Can this contract bind that multitude of individuals who never heard of it, who have never been called to sanction it, and who could not have refused their consent without endangering their fortunes and their lives?

Besides, in the greater part of monarchies, this pretended contract has not even the appearance of reality. We do not see even the shadow of an engagement between the prince and the people.

It is not necessary to make the happiness of the human race dependent on a fiction. It is not necessary to erect the social pyramid upon a foundation of sand, or upon a clay which slips from beneath it. Let us leave such trifling to children; men ought to speak the language of truth and reason.

The true political tie is, the immense interest which men have in maintaining a government. Without a government, there can be no security; no domestic enjoyments; no property; no industry. It is in this fact that we ought to seek the basis and the reason of all governments, whatever may be their origin and their form; it is by comparing them with their object, that we can reason with solidity upon their rights and their obligations, without having recourse to pretended contracts which can only serve to produce interminable disputes.

*7. Fancy is not a reason.*

Nothing is more common than to say, *reason decides*,



*eternal reason orders, &c.* But what is this reason? If it is not a distinct view of good or evil, it is mere fancy; it is a despotism, which announces nothing but the interior persuasion of him who speaks. Let us see upon what foundation a distinguished jurist has sought to establish the paternal authority. A man of ordinary good sense would not see much difficulty in that question; but your learned men find a mystery everywhere.

"The right of a father over his children," says Cocceiji, "is founded in reason; for, 1st, children are born in a house, of which the father is the master; 2d, they are born in a family of which he is the chief; 3d, they are of his seed, and a part of his body." These are the reasons from which he concludes, among other things, that a man of forty ought not to marry without the consent of a father, who in the course of nature must by that time be in his dotage. What there is common to these three reasons is, that none of them has any relation to the interests of the parties. The author consults neither the welfare of father nor that of the children.

*The right of a father*, is an improper phrase. The question is not of an unlimited, nor of an indivisible right. There are many kinds of rights which may be granted or refused to a father, each for particular reasons.

The first reason which Cocceiji alleges, is founded upon a fact which is true only by accident. Let a traveller have children who are born at a tavern, on board a vessel, or in the house of a friend, such a father would lack this first basis of paternal authority. According to this reasoning, the children of a domestic, and those of a soldier, ought not to be subject to their fathers' commands, but to those of the person in whose house they are born.

If the second reason has any determinate sense, it is only a repetition of the first. Is the child of a man who lives in

his father's house, or in the house of an elder brother, or a patron, born in a family of which his father is the chief?

The third reason is as futile as it is indecent. "The child is born of the seed of his father, and is a part of his body." If this is the foundation of the right, it ought to put the power of the mother far above that of the father.

And here we may remark an essential difference between false principles, and the true one. The principle of utility, applying itself only to the interests of the parties, bends to circumstances, and accommodates itself to every case. False principles, being founded upon things which have nothing to do with individual interests, would be inflexible, if they were consistent. Such is the character of this pretended right founded upon birth. The son naturally belongs to the father, because the matter of which the son is formed, once circulated in the father's veins. No matter how unhappy he renders his son;—it is impossible to annihilate his right, because we cannot make his son cease to be his son. The corn of which your body is made, formerly grew in my field; how is it that you are not my slave?

#### 8. *Antipathy and sympathy are not reasons.*

Reasoning by antipathy is most common upon subjects connected with penal law; for we have antipathies against actions reputed to be crimes; antipathies against individuals reputed to be criminals; antipathies against the ministers of justice; antipathies against such and such punishments. This false principle has reigned like a tyrant throughout this vast province of law. Beccaria first dared openly to attack it. His arms were of celestial temper; but if he did much towards destroying the usurper, he did very little towards the establishment of a new and more equitable rule.

It is the principle of antipathy, which leads us to speak of offences, as *deserving* punishment. It is the correspond-

ing principle of sympathy, which leads us to speak of certain actions as *meriting* reward. This word *merit* can only lead to passion and to error. It is *effects*, good or bad, which we ought alone to consider.

But when I say that *antipathies and sympathies are no reason*, I mean those of the legislator; for the antipathies and sympathies of the people may be reasons, and very powerful ones. However odd or pernicious a religion, a law, a custom may be, it is of no consequence, so long as the people are attached to it. The strength of their prejudice is the measure of the indulgence which should be granted to it. To take away an enjoyment or a hope, chimerical though it may be, is to do the same injury, as if we took away a real hope, a real enjoyment. In such a case, the pain of a single individual, becomes by sympathy, the pain of all. Thence results a crowd of evils; antipathy against a law which wounds the general prejudice; antipathy against the whole code of which that law is a part; antipathy against the government which carries the laws into execution; a disposition not to aid in their execution; a disposition secretly to oppose it; a disposition to oppose it openly, and by force; a disposition to destroy a government which sets itself in opposition to the popular will;—all the evils produced by those offences, which in a collective shape, form that sad compound, called *rebellion*, or *civil war*;—all the evils produced by the punishments, which are resorted to, as a means of putting a stop to those offences. Such is the succession of fatal consequences, which are always ready to arise from fancies and prejudices violently opposed. The legislator ought to yield to the violence of a current which carries away every thing that obstructs it. But let us observe, that in such a case, the fancies themselves are not the reason that determines the legislator; his reason is, the evils which threaten to grow out of an opposition to those fancies.

But ought the legislator to be a slave to the fancies of those whom he governs? No. Between an imprudent opposition and a servile compliance, there is a middle path, honorable and safe. It is, to combat these fancies with the only arms that can conquer them,—example and instruction. He must enlighten the people, he must address himself to the public reason; he must give time for error to be unmasked. Sound reasons, clearly set forth, are of necessity stronger than false ones. But the legislator ought not to show himself too openly in these instructions, for fear of compromising himself with the public ignorance. Indirect means will better answer his end.

It is to be observed however, that too much deference for prejudices, is a more common fault than the contrary excess. The best projects of laws, are forever stumbling against this common objection,—“prejudice is opposed to it; the people will be offended!” But how is that known? How has public opinion been consulted? What is its organ? Have the whole people but one uniform notion on the subject? Have all the individuals of the community the same sentiments, including perhaps nine out of ten, who never heard the subject spoken of? Besides, if the people are in error; are they compelled always to remain so? Will not an influx of light dissipate the darkness which produces error? Can we expect the people to possess sound knowledge, while it is yet unattained by their legislators; by those who are regarded as the wise men of the land? Have there not been examples of other nations who have come out of a similar ignorance, and where triumphs have been achieved over the same obstacles?

After all, popular prejudice serves oftener as a pretext than as a motive. It is a convenient cover for the weakness of statesmen. The ignorance of the people, is the favorite argument of pusillanimity and of indolence; while the real motives are, prejudices from which the legislators themselves

have not been able to get free. The name of the people is falsely used to justify their leaders.

9. *Begging the question is not a reason.*

The *petitio principii*, or begging the question, is one of the sophisms which is noted by Aristotle; but it is a Proteus which conceals itself artfully, and is reproduced under a thousand forms.

Begging the question, or rather assuming the question, consists in making use of the very proposition in dispute, as though it were already proved.

This false procedure insinuates itself into morals and legislation, under the disguise of *sentimental* or *impassioned* terms, that is, terms which beside their principal sense, carry with them an accessory idea of praise or blame. *Neuter* terms are those which simply express the thing in question, without any attending presumption of good or evil; without introducing any foreign idea of blame or approbation.

Now it is to be observed, that an impassioned term envelops a proposition, not expressed, but understood, which always accompanies its employment, though in general unperceived by those who employ it. This concealed proposition implies either blame or praise; but the implication is always vague and undetermined.

Do I desire to connect an idea of utility, with a term which commonly conveys an accessory idea of blame? I shall seem to advance a paradox, and to contradict myself. For example, should I say that such a piece of *luxury* is a good thing? The proposition astonishes those who are accustomed to attach to this word *luxury*, a sentiment of disapprobation.

How shall I be able to examine this particular point, without awaking a dangerous association? I must have recourse to a neuter word; I must say, for example, *such a manner of spending one's revenue*, is good. This turn of expression

runs counter to no prejudice; and permits an impartial examination of the object in question. When Helvetius advanced the idea, that all actions have *interest* for their motive, the public cried out against his doctrine without stopping to understand it. Why? Because the word *interest* has an odious sense; a common acceptance, in which it seems to exclude every motive of pure attachment and of benevolence.

How many reasonings upon political subjects, are founded upon nothing but impassioned terms! People suppose they are giving a reason for a law, when they say that it is conformable to the principles of monarchy, or of democracy. But that means nothing. If there are persons in whose minds these words are associated with an idea of approbation, there are others who attach contrary ideas to them. Let these two parties begin to quarrel, the dispute will never come to an end, except through the weariness of the combatants. For before beginning a true examination, we must renounce these impassioned terms, and calculate the effects of the proposed law, in good and evil.

Blackstone admires in the British constitution, the combination of the three forms of government; and he hence concludes that it must possess the collected good qualities of monarchy, aristocracy, and democracy. How happened it that he did not perceive, that without changing his premises, a conclusion might be drawn from them, diametrically opposite, yet equally just; to wit, that the British constitution must unite all the particular *faults* of democracy, aristocracy, and monarchy?

To the word *independence*, there are attached certain accessory ideas of dignity and virtue; to the word *dependence*, accessory ideas of inferiority and corruption. Hence it is, that the panegyrists of the British constitution admire the *independence* of the three powers, of which the legislature is composed. This in their eyes, is the master-piece of politics;

the happiest trait in that whole scheme of government. On the other side, those who would detract from the merits of that constitution, are always insisting upon the actual *dependence* of one or the other of its branches. Neither the praise nor the censure contain any reasons.

As to the fact, the pretended independence does not exist. The king and the greater part of the lords, have a direct influence upon the election of the House of Commons. The king has the power of dissolving that House at any moment; a power of no little efficacy. The king exercises a direct influence by honorable and lucrative employments, which he gives or takes away at pleasure. On the other side, the king is dependent upon the two Houses, and particularly upon the Commons, since he cannot maintain himself without money and troops,—two principal and essential matters which are wholly under the control of the representatives of the people. What pretence has the House of Lords to be called independent, while the king can augment its number at pleasure, and change the vote in his favor by the creation of new lords; exercising too, as he does, an additional influence on the temporal peers, by the prospect of advancement in the ranks of the peerage; and on the bishops, by the bait of ecclesiastical promotion?

Instead of reasoning upon a deceptive word, let us consider effects. It is the reciprocal dependence of these three powers which produces their agreement; which subjects them to fixed rules, which gives them a steady and systematic operation. Hence, the necessity of mutual respect, attention, concession, and moderation. If they were absolutely independent, there would be continual shocks between them. It would often be necessary to appeal to force; and the result would be, a state of anarchy.

I cannot refrain from giving two other examples of this error of reasoning, founded upon the misuse of terms.

If we attempt a theory upon the subject of *national repre-*

representation, in following out all that appears to be a natural consequence of that abstract idea, we come at last to the conclusion that *universal suffrage* ought to be established; and to the additional conclusion that the representatives ought to be re-chosen as frequently as possible, in order that the national representation may deserve to be esteemed such.

In deciding these same questions according to the principle of utility, it will not do to reason upon words; we must look only at effects. In the election of a legislative assembly, the right of suffrage should not be allowed except to those who are esteemed by the nation, fit to exercise it; for a choice made by men who do not possess the national confidence, will weaken the confidence of the nation in the assembly so chosen.

Men who would not be thought fit to be electors, are those who cannot be presumed to possess political integrity, and a sufficient degree of knowledge. Now we cannot presume upon the political integrity of those whom want exposes to the temptation of selling themselves; nor of those who have no fixed abode; nor of those who have been found guilty in the courts of justice, of certain offences forbidden by the law. We cannot presume a sufficient degree of knowledge in women, whom their domestic condition withdraws from the conduct of public affairs; in children and adults beneath a certain age; in those who are deprived by their poverty, of the first elements of education, &c. &c.

It is according to these principles, and others like them, that we ought to fix the conditions necessary for becoming an elector; and it is in like manner, upon the advantages and disadvantages of frequent elections, without paying any attention to arguments drawn from abstract terms, that we ought to reason in establishing the duration of a legislative assembly.

The last example I shall give, will be taken from *contracts*;



I mean those political fictions to which this name has been applied by their authors.

When Locke and Rousseau reason upon this pretended contract; when they affirm that the social or political contract includes such and such a clause, can they prove it otherwise than by the general utility which is supposed to result from it? Grant that this contract, which has never been reduced to writing, is however in full existence. On what depends all its force? Is it not upon its utility? Why ought we to fulfil our engagements? Because the faith of promises, is the basis of society. It is for the advantage of all, that the promises of every individual should be faithfully observed. There would no longer be any security among men, no commerce, no confidence;—it would be necessary to go back to the woods, if engagements did not possess an obligatory force. It is the same with these political contracts. It is their utility which makes them binding. When they become injurious, they lose their force. If a king had taken an oath to render his subjects unhappy, would such an engagement be valid? If the people were sworn to obey him at all events, would they be bound to suffer themselves to be exterminated by a Nero or a Caligula, rather than violate their promise? If there resulted from the contract, effects universally injurious, could there be any sufficient reason for maintaining it? It cannot be denied then, that the validity of a contract is at bottom, only a question of utility, a little wrapped up, a little disguised, and in consequence, more susceptible of false interpretations.

10. *An imaginary law is not a reason.*

*Natural law, natural rights*, are two kinds of fictions or metaphors which play so great a part in books of legislation, that they deserve to be examined by themselves:

The primitive sense of the word *law*, and the ordinary meaning of the word, is—the will or command of a legisla-

tor. The *law of nature* is a figurative expression, in which nature is represented as a being; and such and such a disposition is attributed to her, which is figuratively called a law. In this sense, all the general inclinations of men, all those which appear to exist independently of human societies, and from which must proceed the establishment of political and civil law, are called *laws of nature*. This is the true sense of the phrase.

But this is not the way in which it is understood. Authors have taken it in a direct sense; as if there had been a real code of natural laws. They appeal to these laws; they cite them, and they oppose them, clause by clause, to the enactments of legislators. They do not see that these natural laws are laws of their own invention; that they are all at odds among themselves as to the contents of this pretended code; that they affirm without proof; that systems are as numerous as authors; and that in reasoning in this manner, it is necessary to be always beginning anew, because every one can advance what he pleases touching laws which are only imaginary, and so keep on, disputing forever.

What is natural to man, is, sentiments of pleasure or pain, what are called inclinations. But to call these sentiments and these inclinations, *laws*, is to introduce a false and dangerous idea. It is to set language in opposition to itself; for it is necessary to make *laws* precisely for the purpose of restraining these inclinations. Instead of regarding them as laws, they must be submitted to laws. It is against the strongest natural inclinations that it is necessary to have laws the most repressive. If there were a law of nature which directed all men towards their common good, laws would be useless; it would be employing a creeper to uphold an oak; it would be kindling a torch to add light to the sun.

Blackstone, in speaking of the obligation of parents to

provide for the support of their children, says, "that it is a principle of natural law, a duty imposed by nature itself, and by the proper act of the parents in bringing the children into the world. Montesquieu," he adds, "observes with reason, that the natural obligation of the father to support his children, is what has caused the establishment of marriage, which points out the person who ought to fulfil this obligation." (Book i. ch. 16.)

Parents *are inclined* to support their children; parents *ought* to support their children; these are two distinct propositions. The first does not suppose the second; the second does not suppose the first. There are, without doubt, the strongest reasons for imposing upon parents the obligation, to bring up their children. Why have not Blackstone and Montesquieu mentioned those reasons? Why do they refer us to what they call the law of nature? What is this law of nature which needs to be propped up by a secondary law from another legislator? -If this natural obligation exists, as Montesquieu says it does, far from serving as the foundation of marriage, it proves its inutility,—at least for the end which he assigns. One of the objects of marriage is, precisely to supply the insufficiency of natural affection. It is designed to convert into obligation, that inclination of parents which would not always be sufficiently strong to surmount the pains and embarrassments of education.

Men are very well disposed to provide for their own support. It has not been necessary to make laws to oblige them to that. If the disposition of parents to provide for the support of their children, had been constantly and universally as strong, legislators never would have thought of turning it into an obligation.

The exposure of infants, so common in ancient Greece, is still practised in China, and to a greater extent. To abolish this practice, would it not be necessary to allege other

reasons, besides this pretended law of nature, which here is evidently at fault?

The word *rights*, the same as the word *law*, has two senses; the one a proper sense, the other a metaphorical sense. — *Rights*, properly so called, are the creatures of *law* properly so called; real laws give birth to real rights. *Natural rights* are the creatures of natural law; they are a metaphor which derives its origin from another metaphor.

What there is natural in man, is, means,—faculties. But to call these means, these faculties, *natural rights*, is again to put language in opposition to itself. For *rights* are established to insure the exercise of means and faculties. The right is the *guarantee*; the faculty is the thing guaranteed. How can we understand each other with a language which confounds under the same term, things so different? Where would be the nomenclature of the arts, if we gave to the *mechanic* who makes an article, the same name as to the article itself?

Real rights are always spoken of in a legal sense; natural rights are often spoken of in a sense that may be called anti-legal. When it is said, for example, that *law cannot avail against natural rights*, the word rights is employed in a sense above the law; for, in this use of it, we acknowledge rights, which attack the law; which overturn it, which annul it. In this anti-legal sense, the word *right* is the greatest enemy of reason, and the most terrible destroyer of governments.

There is no reasoning with fanatics, armed with *natural rights*; which each one understands as he pleases, and applies as he sees fit; of which nothing can be yielded, nor retrenched; which are inflexible, at the same time that they are unintelligible; which are consecrated as dogmas, from which it is a crime to vary. Instead of examining laws by their effects, instead of judging them as good or as bad, they consider them in relation to these pretended

natural rights; that is to say, they substitute for the reasoning of experience, the chimeras of their own imaginations.

This is not a harmless error; it passes from speculation into practice. "Those laws must be obeyed, which are accordant with nature; the others are null in fact; and instead of obeying them, they ought to be resisted. The moment natural rights are attacked, every good citizen ought to rouse up in their defence. These rights, evident in themselves, do not need to be proved; it is sufficient to declare them. How prove what is evident already? To doubt, implies a want of sense, or a fault of intellect;" &c.

But not to be accused of gratuitously ascribing such seditious maxims to these inspired politicians of nature, I shall cite a passage from Blackstone, directly to the point; and I choose Blackstone, because he is, of all writers, the one who has shown the most profound respect for the authority of governments. In speaking of these pretended laws of nature, and of the laws of revelation, he says: "Human laws must not be permitted to contradict these; if a human law commands a thing forbidden by the natural or divine law, we are bound to transgress that human law," &c. 1 Comm. p. 43.

Is not this arming every fanatic against all governments? In the immense variety of ideas respecting natural and divine law, cannot some reason be found for resisting all human laws? Is there a single state which can maintain itself a day, if each individual holds himself bound in conscience to resist the laws, whenever they are not conformed to his particular ideas of natural or divine law? What a cut-throat scene of it we should have, between all the interpreters of the code of nature, and all the interpreters of the law of God!

"The pursuit of happiness is a natural right." The pursuit of happiness is certainly a natural inclination; but

can it be declared to be a right? That depends on the way in which it is pursued. The assassin pursues his happiness, or what he esteems such, by committing an assassination. Has he a right to do so? If not, why declare that he has? What tendency is there in such a declaration to render men more happy, or more wise?

Turgot was a great man; but he had adopted the general opinion without examining it. Inalienable and natural rights were the despotism or the dogmatism, which he wished to exercise, without himself perceiving it. If he saw no reason to doubt a proposition; if he judged it evidently true; he referred it, without going further, to natural right, to eternal justice. Henceforward he made use of it as an article of faith, which he was no longer permitted to examine.

Utility having been often badly applied, understood in a narrow sense, and having lent its name to crimes, has appeared contrary to eternal justice. It thus became degraded, and acquired a mercenary reputation. It needs courage to restore it to honor, and to re-establish reasoning upon its true basis.

I propose a treaty of conciliation with the partisans of natural rights. If *nature* has made such or such a law, those who cite it with so much confidence, those who have modestly taken upon themselves to be its interpreters, must suppose that nature had some reasons for her law. Would it not be surer, shorter and more persuasive, to give us those reasons directly, instead of urging upon us the will of this unknown legislator, as itself an authority?

Here would be the place to remark the false methods of argument, which especially prevail, in deliberative assemblies—personalities, imputations of bad motives, declamations, delays. But what has been said above is enough to show what is reasoning, according to the principle of utility, and what is not.

All these false methods of reasoning can always be reduced to one or the other of the two false principles. This fundamental distinction is very useful in getting rid of words, and rendering ideas more clear. To refer such or such an argument to one or another of the false principles, is like tying weeds into bundles, to be thrown into the fire.

I conclude with a general observation. The language of error is always obscure, and indefinite. An abundance of words serves to cover a paucity and a falsity of ideas. The oftener terms are changed, the easier it is to delude the reader. The language of truth is uniform and simple. The same ideas are always expressed by the same terms. Every thing is referred to pleasures, or to pains. Every expression is avoided which tends to disguise or intercept the familiar idea, that, *from such and such actions, result such and such pleasures and pains.* Trust not to me but to experience, and especially your own. *Of two opposite methods of action, do you desire to know which should have the preference? Calculate their effects in good and evil, and prefer that which promises the greater sum of good.*

# PRINCIPLES OF THE CIVIL CODE.

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## INTRODUCTION.

BY DUMONT.

Of all the branches of legislation, civil law is that which has the least attraction for those who do not study jurisprudence as a profession. But this is not saying enough. In fact, it inspires a kind of terror. Curiosity has for a long time been ardently exercised upon political economy, upon penal law, and upon the principles of government. Celebrated works have given credit to those studies; and under the penalty of confessing an humbling inferiority, it is necessary to have some information, and to express some opinions about them. But civil law has not yet come out of the narrow enclosure of the bar. Its commentators sleep in the dust of libraries, by the side of its controversialists. The public knows not even the names of its sects; and regards with a mute and ignorant respect, those numerous folios, those enormous compilations, ornamented with the pompous titles of *Bodies of Law*, and *Collections of Universal Jurisprudence*.



The general repugnance against this study, results from the manner in which it has been treated. The works above alluded to, bear the same relation to the science of law, which was borne to the natural sciences by the works of the scholastic writers, before the introduction of experimental philosophy. They who attribute the dryness and obscurity of those works to the nature of the subject, are altogether too indulgent.

What is it of which this part of the law treats? It treats of everything that is most interesting to men; of their security; of their property; of their mutual and daily transactions; of their domestic condition, in the relations of father, of children, of husband, and of wife. Here it is that *rights* and *obligations* spring up; for all the objects of law, may be reduced without mystery, to these two terms.

The civil law is, in fact, only another aspect of the penal law; one cannot be understood without the other. To establish *rights*, is to grant permissions; it is to make prohibitions; it is, in one word, to create offences. To commit a private offence is, to violate an obligation which we owe to an individual,—a right which he has in regard to us. To commit a public offence is, to violate an obligation which we owe to the public,—a right which the public has in regard to us. Civil law, then, is only penal law viewed under another aspect. If I consider a law at the moment when it confers a right, or imposes an obligation, this is the civil point of view. If I consider a law in its sanction, in its effects as regards the violation of that right, the breaking through that obligation, that is the penal point of view.

What is to be understood by *principles of civil law*? They are the *motives* of laws; the knowledge of the true *reasons* which ought to guide the legislator in the distribution of the rights which he confers, and the obligations which he imposes.

We might search in vain through the libraries of law

books, for a volume in which it has been attempted to found laws upon reasons. The *theory of civil laws* by Linguet, promises much in its title, which it is very far from performing. It is the production of a disordered imagination, in the service of a bad heart. The author wishes to reduce all governments to the model of oriental despotism, and to strike out of them all notions of liberty and humanity, in his view mournful spectres, the sight of which appears to torment him.

The disputes of jurisprudence have produced, among the lawyers, a kind of unbelievers, who have doubted whether law has any principles. According to them, every thing is arbitrary: The law is good because it is the law; because a decision of whatever kind, produces the great advantage of peace. There is a little truth in this opinion, and a great deal of error. It will be seen in the following chapters, that the principle of utility extends to this part of the law, as to all others. But its application is difficult; it demands an intimate knowledge of human nature.

The first ray of light, which struck the mind of Bentham, in the study of law was, the perception that *natural rights*, the *original pact*, the *moral sense*, the *notion of just and unjust*, which are used to explain every thing, were at bottom, nothing but those *innate ideas* of which Locke has so clearly shown the falsity. He saw that authors were going round in a vicious circle. Familiar with the method of Bacon and of Newton, he resolved to transfer it to the subject of legislation; he resolved to make jurisprudence an experimental science. He avoided all dogmatic words; he rejected every thing which did not express a sensation of pain or pleasure; he refused to admit, for example, that property was an inherent right, or a natural right, because these terms explained nothing and proved nothing. The words *justice* and *injustice*, had in his estimation, a similar inconvenience,—that of prejudging questions, instead of

throwing light upon them. When he proposes a law, he does not pretend to find a corresponding law in the code of nature; and by a common piece of legerdemain, to present as a thing made already, the very thing he wishes to make. When he explains *obligations*, he does not wrap himself up in mysterious reasons; he admits no supposition; he shows plainly that every obligation ought to be founded either upon a precedent service received by the person obligated; upon a superior need on the part of him in whose favor the obligation is imposed; or upon a mutual agreement which derives all its force from its utility. Thus, always guided by experience and observation, he considers in laws, nothing but the effects they produce upon the faculties of man as a sensitive being; and he always gives, *pains to be avoided*, as the only arguments of real value.

The lawyers are always reasoning upon fictions, and giving to those fictions the same effect as to realities. They admit, for example, *contracts* which never have existed; and *quasi-contracts* which have not even an appearance of existence. In certain cases they admit a *civil death*, in others they deny the *natural death*; such a dead man is not dead; such a living man is not living. A person who is absent is taken to be present; a person who is present is regarded as absent. A province is not where it is; a country does not belong to those who own it. Men are sometimes *things*, and as such are not susceptible of rights. *Things* are sometimes beings who have rights, and who are submitted to obligations. They acknowledge imprescriptible rights, against which prescription has always prevailed; inalienable rights which have always been alienated; and that *which is not*, in their eyes, is always of more avail than that *which is*. Take away these fictions, or rather these falsehoods, and they would not know where they were. Accustomed to these false supports, they cannot sustain themselves in any other way. Bentham has rejected all

these puerile arguments; he makes no gratuitous suppositions, he uses no arbitrary definitions; no reason which is not the expression of a fact; no fact which is not a statement of good or bad effects.

It is by this logical method of reasoning, that he has made a new science of civil law; new and even paradoxical for those who have been bred in the opinions of the old schools; but simple, natural, and even familiar, to those who have not been bewildered by false systems. A translation of this book will have in all languages the same sense and the same force,—because it appeals to the universal experience of men; while technical reasons, reasons founded upon abstract terms, upon arbitrary definitions having only a local value, and consisting only in words, vanish, when one attempts to find synonymes by which to translate them. So the African tribes, who use shells for money, become conscious of their poverty, the moment they go beyond their own boundaries, and offer their conventional riches to strangers.

I ought to add, that Bentham made frequent digressions upon the laws of England, which I have suppressed; for they have only a local interest. There are cases, however, where his observations would have lacked a foundation, if I had omitted to mention the particular laws which were their object. In seeking to be more clear, to develop that which in the original was often only an allusion, I may have made some mistakes, which it would be unjust to impute to the author. These laws are so difficult to understand, that it is dangerous for an Englishman who is not a lawyer, to run the risk of speaking about them,—a risk which, for obvious reasons, must be still greater in the case of a foreigner.

## PART FIRST.

### OBJECTS OF THE CIVIL LAW.

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#### CHAPTER I.

##### *Rights and Obligations.*

ALL the objects which the legislator is called upon to distribute among the members of the community, may be reduced to two classes:—

1st. *Rights.*

2d. *Obligations.*

Rights are in themselves advantages, benefits, for him who enjoys them. Obligations, on the contrary, are duties, charges, onerous to him who ought to fulfil them.

Rights and obligations, though distinct and opposite in their nature, are simultaneous in their origin, and inseparable in their existence. In the nature of things, the law cannot grant a benefit to one, without imposing at the same time some burden upon another; or in other words, it is not possible to create a right in favor of one, except by creating a corresponding obligation imposed upon another. How confer upon me the right of property in a piece of land? By imposing upon all others an obligation not to touch its produce. How confer upon me a right of command? By imposing upon a district, or a number of persons, the obligation to obey me.

The legislator ought to confer rights with pleasure, since they are in themselves a good; he ought to impose obligations with reluctance, since they are in themselves an evil. According to the principle of utility, he ought never to impose a burden, except for the purpose of conferring a benefit of a clearly greater value.

By creating obligations, the law to the same extent, trenches upon liberty. It converts into offences, acts which would otherwise be permitted and unpunishable. The law creates an offence, either by a positive command, or by a prohibition.

These retrenchments of liberty are inevitable. It is impossible to create rights, to impose obligations, to protect the person, life, reputation, property, subsistence, liberty itself, except at the expense of liberty.

But every restriction imposed upon liberty, is subject to be followed by a natural sentiment of pain, greater or less; and that, independently of an infinite variety of inconveniences and sufferings, which may result from the particular manner of this restriction. It follows then, that no restriction ought to be imposed, no power conferred, no coercive law sanctioned, without a sufficient and specific reason. There is always a reason against every coercive law,—a reason, which in default of any opposing reason, will always be sufficient in itself; and that reason is, that such a law is an attack upon liberty. He who proposes a coercive law, ought to be ready to prove not only that there is a specific reason in favor of it, but that this reason is of more weight than the general reason against every such law.

The proposition, that every law is contrary to liberty,\* though as clear as evidence can make it, is not generally acknowledged. On the contrary, those among the friends

\* Those laws must be excepted, by which restrictive laws are revoked, laws which *permit* what other laws had forbidden.

of liberty who are more ardent than enlightened, make it a duty of conscience to combat this truth. And how? They pervert language; they refuse to employ the word *liberty* in its common acceptation; they speak a tongue peculiar to themselves. This is the definition they give of liberty: *Liberty consists in the right of doing every thing which is not injurious to another.* But is this the ordinary sense of the word? Is not the liberty to do evil, liberty? If not, what is it? What word can we use in speaking of it? Do we not say that it is necessary to take away liberty from idiots and bad men, because they abuse it?

According to this definition, I can never know whether I have the liberty to do an action, until I have examined all its consequences. If it seems to me injurious to a single individual, even though the law permit it, or perhaps command it, I should not be at liberty to do it. An officer of justice would not be at liberty to punish a robber,—unless indeed he were sure that this punishment could not hurt the robber! Such are the absurdities which this definition implies.

What does simple reason tell us? Let us attempt to establish a series of true propositions on this subject.

The only object of government ought to be, the greatest possible happiness of the community.

The happiness of an individual is increased in proportion as his sufferings are lighter and fewer, and his enjoyments greater and more numerous.

The care of his enjoyments ought to be left almost entirely to the individual. The principal function of government is, to guard against pains.

It fulfils this object by creating rights, which it confers upon individuals; rights of personal security; rights of protection for honor; rights of property; rights of receiving aid in case of need. To these rights correspond offences of different kinds. The law cannot create rights except by

creating corresponding obligations. It cannot create rights and obligations without creating offences. It cannot command nor forbid, without restraining the liberty of individuals.

It appears then, that the citizen cannot acquire rights except by sacrificing a part of his liberty. But even under a bad government; there is no proportion between the acquisition and the sacrifice. Government approaches to perfection in proportion as the sacrifice is less, and the acquisition more.

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## CHAPTER II.

### *Ends of Civil Law.*

In the distribution of rights and obligations, the legislator, as we have said, should have for his end the happiness of society. Investigating more distinctly in what that happiness consists, we shall find four subordinate ends:—

Subsistence.

Abundance.

Equality.

Security.

The more perfect enjoyment is in all these respects, the greater is the sum of social happiness; and especially of that happiness which depends upon the laws.

We may hence conclude, that all the functions of law may be referred to these four heads: To provide subsistence: To produce abundance: To favor equality: To maintain security.

This division has not all the exactness which might be desired. The limits which separate these objects are not always easy to be determined. They approach each other



at different points, and mingle together. But it is enough to justify this division, that it is the most complete we can make; and that in fact, we are generally called to consider each of the objects which it contains, separately and distinct from all the others.

Subsistence, for example, is included in abundance; still it is very necessary to consider it separately; because the laws ought to do many things for subsistence, which they ought not to attempt for the sake of abundance.

Security admits as many distinctions as there are kinds of actions which may be hostile to it. It relates to the person, the honor, to property, to condition. Acts injurious to security, branded by prohibition of law, receive the quality of offences.

Of these objects of the law, security is the only one which necessarily embraces the future. Subsistence, abundance, equality, may be considered in relation to a single moment of present time; but security implies a given extension of future time, in respect to all that good which it embraces. Security then is the pre-eminent object.

I have mentioned equality as one of the objects of law. In an arrangement designed to give to all men the greatest possible sum of good, there is no reason why the law should seek to give more to one individual than to another. There are abundance of reasons why it should not; for the advantages acquired on one side, never can be an equivalent for the disadvantages felt upon the other. The pleasure is exclusively for the party favored; the pain for all who do not share the favor.

Equality may be promoted, either by protecting it where it exists, or by seeking to produce it. In this latter case, the greatest caution is necessary; for a single error may overturn social order.\*

\* Equality may be considered in relation to all the advantages which depend upon laws. Political equality is an equality of political

Some persons may be astonished to find that *Liberty* is not ranked among the principal objects of law. But a clear idea of liberty will lead us to regard it as a branch of security. Personal liberty is security against a certain kind of injuries which affect the person. As to what is called *political liberty*, it is another branch of security,—security against injustice from the ministers of government. What concerns this object belongs not to civil, but to constitutional law.

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### CHAPTER III.

#### *Relations between these ends.*

THESE four objects of law are very distinct in idea, but they are much less so in practice. The same law may advance several of them; because they are often united. That law, for example, which favors security, favors, at the same time, subsistence and abundance.

But there are circumstances in which it is impossible to unite these objects. It will sometimes happen that a measure suggested by one of these principles, will be condemned by another. Equality, for example, might require a distribution of property which would be incompatible with security.

When this contradiction exists between two of these ends, it is necessary to find some means of deciding the pre-eminence, otherwise these principles, instead of guiding us in our researches, will only serve to augment the confusion.

At the first glance we see subsistence and security rising together to the same level; abundance and equality are manifestly of inferior importance. In fact, without secu-

rights; civil equality is an equality of civil rights. When used by itself, the word is commonly understood to refer to the distribution of property. It is so used in this treatise.

rity, equality could not last a day ; without subsistence, abundance could not exist at all. The two first objects are life itself ; the two latter, the ornaments of life.

In legislation, the most important object is, security. Though no laws were made directly for subsistence, it might easily be imagined that no one would neglect it. But unless laws are made directly for security, it would be quite useless to make them for subsistence. You may order production ; you may command cultivation ; and you will have done nothing. But assure to the cultivator the fruits of his industry, and perhaps in that alone, you will have done enough.

Security, as we have said, has many branches ; and some branches of it must yield to others. For example, liberty, which is a branch of security, ought to yield to a consideration of the general security, since laws cannot be made except at the expense of liberty.

We cannot arrive at the greatest good, except by the sacrifice of some subordinate good. All the difficulty consists in distinguishing that object which according to the occasion, merits pre-eminence. For each, in its turn, demands it ; and a very complicated calculation is sometimes necessary to avoid being deceived as to the preference due to one or the other.

Equality ought not to be favored except in the cases in which it does not interfere with security ; in which it does not thwart the expectations which the law itself has produced, in which it does not derange the order already established.

If all property were equally divided, at fixed periods, the sure and certain consequence would be, that presently there would be no property to divide. All would shortly be destroyed. Those whom it was intended to favor, would not suffer less from the division, than those at whose expense it was made. If the lot of the industrious was not better than

the lot of the idle, there would be no longer any motives for industry.

To lay down as a principle, that all men ought to enjoy a perfect *equality of rights*, would be, by a necessary connection of consequences, to render all legislation impossible. The laws are constantly establishing inequalities, since they cannot give rights to one without imposing obligations upon another. To say that all men, that is, all human beings, have equal rights, is to say that there is no such thing as subordination. The son then has the same rights with his father; he has the same right to govern and punish his father, that his father has to govern and punish him. He has as many rights in the house of his father, as the father himself. The maniac has the same right to shut up others, that others have to shut up him. The idiot has the same right to govern his family, that his family have to govern him. All this is fully implied in the absolute equality of rights. It means this, or else it means nothing. I know very well that those who maintain this doctrine of the equality of rights, not being themselves either fools or idiots, have no intention of establishing this absolute equality. They have in their own minds, restrictions, modifications, explanations. But if they themselves cannot speak in an intelligible manner, will the ignorant and excited multitude understand them, better than they understand themselves?

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## CHAPTER IV.

### *Laws relatively to Subsistence.*

WHAT can the law do for subsistence? Nothing directly. All it can do is, to create *motives*, that is punishments or rewards, by the force of which men may be led to pro-

vide subsistence for themselves. But nature herself has created these motives, and has given them a sufficient energy. Before the idea of laws existed, *needs* and *enjoyments* had done in that respect, all that the best concerted laws could do. Need, armed with pains of all kinds, even death itself, commanded labor, excited courage, inspired foresight, developed all the faculties of man. Enjoyment, the inseparable companion of every need satisfied, formed an inexhaustible fund of rewards for those who surmounted obstacles and fulfilled the end of nature. The force of the physical sanction being sufficient, the employment of the political sanction would be superfluous.

Besides, the motives which depend on laws, are more or less precarious in their operation. It is a consequence of the imperfection of the laws themselves ; or of the difficulty of proving the facts in order to apply punishment or reward. The hope of impunity conceals itself at the bottom of the heart, during all the intermediate steps which it is necessary to take, before arriving at the enforcement of the law. But the natural effects, which may be regarded as nature's punishments and rewards, scarcely admit of any uncertainty. There is no evasion, no delay, no favor. Experience announces the event, and experience confirms it. Each day strengthens the lesson of the day before ; and the uniformity of this process leaves no room for doubt. What could be added by direct laws, to the constant and irresistible power of these natural motives ?

But the laws provide for subsistence indirectly, by protecting men while they labor, and by making them sure of the fruits of their labor. *Security* for the laborer, *Security* for the fruits of labor ; such is the benefit of laws ; and it is an inestimable benefit.

## CHAPTER V.

*Laws relatively to Abundance.*

SHALL laws be made directing individuals not to confine themselves to mere subsistence, but to seek abundance? No! That would be a very superfluous employment of artificial means, where natural means suffice. The attraction of pleasure; the succession of wants; the active desire of increasing happiness, will procure unceasingly, under the reign of security, new efforts towards new acquisitions. Wants, enjoyments, those universal agents of society, having begun with gathering the first sheaf of corn, proceed little by little, to build magazines of abundance, always increasing but never filled. Desires extend with means. The horizon elevates itself as we advance; and each new want, attended on the one hand by pain, on the other by pleasure, becomes a new principle of action. Opulence, which is only a comparative term, does not arrest this movement once begun. On the contrary, the greater our means, the greater the scale on which we labor, the greater is the recompense, and consequently, the greater also the force of motive which animates to labor. Now what is the wealth of society, if not the sum of all individual wealth? And what more is necessary, than the force of these natural motives, to carry wealth by successive movements, to the highest possible point?

It appears that abundance is formed little by little, by the continued operation of the same causes which produce subsistence. Those who blame abundance under the name of luxury, have never looked at it from this point of view.

Bad seasons, wars, accidents of all kinds, attack so often the fund of subsistence, that a society which had nothing

superfluous, and even if it had a good deal that was superfluous, would often be exposed to want what is necessary. We see this among savage tribes; it was often seen among all nations, during the times of ancient poverty. It is what happens even now, in countries little favored by nature, such as Sweden; and in those where government restrains the operations of commerce, instead of confining itself to protection. But countries in which luxury abounds, and where governments are enlightened, are above the risk of famine. Such is the happy situation of England. With a free commerce, toys useless in themselves, have their utility, as the means of obtaining bread. Manufactures of luxury furnish an assurance against famine. A brewery or a starch-factory might be changed into a means of subsistence.

How often have we heard declamations against dogs and horses, as devouring the food of men! Such declaimers rise but one degree above those apostles of disinterestedness, who set fire to the magazines in order to cause an abundance of corn.

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## CHAPTER VI.

*Pathological propositions upon which the good of Equality is founded.*

**PATHOLOGY** is a term used in medicine. It has not been introduced into morals, where it is equally needed, though in a somewhat different sense. By *pathology*, I mean the study and the knowledge of the sensations, affections, passions, and of their effects upon happiness. Legislation, which hitherto has been founded in a great measure, only upon

the quicksands of prejudice and instinct, ought at last to be built upon the immovable basis of sensations and experience. It is necessary to have a moral thermometer to make perceptible all the degrees of happiness and misery. This is a term of perfection which it is not possible to reach ; but it is well to have it before our eyes. I know that a scrupulous examination of more or less, in the matter of pain or pleasure, will at first appear a minute undertaking. It will be said that in human affairs, it is necessary to act in gross ; to be contented with a vague approximation. This is the language of indifference or of incapacity. The sensations of men are sufficiently regular to become the objects of a science and an art. Yet hitherto we have seen but essays, blind attempts, and irregular efforts not well followed up. Medicine has for its foundation the axioms of physical pathology. Morality is the medicine of the soul ; and legislation, which is the practical part of it, ought to have for its foundation, the axioms of mental pathology.

To judge of the effect of a portion of wealth upon happiness, it is necessary to consider it in three different states :

1st. When it has always been in the hands of the holder.

2d. When it is leaving his hands.

3d. When it is coming into them.

It is to be observed in general, that in speaking of the effect of a portion of wealth upon happiness, abstraction is always to be made of the particular sensibility of individuals, and of the exterior circumstances in which they may be placed. Differences of character are inscrutable ; and such is the diversity of circumstances, that they are never the same for two individuals. Unless we begin by dropping these two considerations, it will be impossible to announce any general proposition. But though each of these propositions may prove false or inexact in a given individual



case, that will furnish no argument against their speculative truth, and practical utility. It is enough for the justification of these propositions, 1st, if they approach nearer the truth than any others which can be substituted for them; 2d, if with less inconvenience than any others, they can be made the basis of legislation.

I. Let us pass to the first case. The object being to examine the effect of a portion of wealth, when it has always been in the hands of the holder, we may lay down the following propositions :—

1st. *Each portion of wealth has a corresponding portion of happiness.*

2d. *Of two individuals with unequal fortunes, he who has the most wealth has the most happiness.*

3d. *The excess in happiness of the richer will not be so great as the excess of his wealth.*

4th. *For the same reasons, the greater the disproportion is between the two masses of wealth, the less is it probable that there exists a disproportion equally great between the corresponding masses of happiness.*

5th. *The nearer the actual proportion approaches to equality, the greater will be the total mass of happiness.*

It is not necessary to limit what is here said of wealth, to the condition of those who are called wealthy. This word has a more extensive signification. It embraces everything which serves either for subsistence or abundance. It is for the sake of brevity, that the phrase *portion of wealth* is used instead of *portion of the matter of wealth*.

I have said that for *each portion of wealth there is a corresponding portion of happiness*. To speak more exactly, it ought rather to be said, *a certain chance of happiness*. For the efficacy of a cause of happiness is always precarious; or in other words, a cause of happiness has not its ordinary effect, nor the same effect, upon all persons. Here is the place for making an application of what has been said con-

cerning the sensibility and the character of individuals, and the variety of circumstances in which they are found.

The second proposition is a direct consequence of the first. *Of two individuals, he who is the richer, is the happier, or has the greater chance of being so.* This is a fact proved by the experience of all the world. The first who doubts it, shall be the very witness I will call to prove it. Let him give all his superfluous wealth to the first comer who asks him for it; for this superfluity, according to his system, is but dust in his hands; it is a burden and nothing more. The manna of the desert putrefied, if any one collected a greater quantity than he could eat. If wealth resembled that manna, and after passing a certain point was no longer productive in happiness, no one would wish for it; and the desire of accumulation would be a thing unknown.

The third proposition is less likely to be disputed. Put on one side, a thousand farmers, having enough to live upon, and a little more. Put on the other side, a king, or, not to be encumbered with the cares of government, a prince, well portioned, himself as rich as all the farmers taken together. It is probable, I say, that his happiness is greater than the average happiness of the thousand farmers; but it is by no means probable that it is equal to the sum total of their happiness, or what amounts to the same thing, a thousand times greater than the average happiness of one of them. It would be remarkable if his happiness were ten times, or even five times greater. The man who is born in the bosom of opulence, is not so sensible of its pleasures, as he who is the artisan of his own fortune. It is the pleasure of acquisition, not the satisfaction of possessing, which gives the greatest delights. The one is a lively sentiment, pricked on by the desires, and by anterior privations, which rushes toward an unknown good; the other is a feeble sentiment, weakened by use, which is not animated by contrasts, and which borrows nothing from the imagination.

II. Passing to the second case, let us examine the effect of a portion of wealth, when it enters for the first time, into the hands of a new possessor. It is to be observed that we must lay expectation out of view. It is necessary to suppose that this augmentation of fortune comes unexpectedly, as a gift of chance.

1st. *A portion of wealth may be so far divided as to produce no happiness at all for any of the participants.* This is what would happen, rigorously speaking, if the portion of each was less in value than the smallest known coin. But it is not necessary to carry the thing to that extreme, in order to make the proposition true.

2d. *Among participants of equal fortunes, the more perfectly equality is preserved, in the distribution of a new portion of wealth, the greater will be the total mass of happiness.*

3d. *Among participants of unequal fortunes, the more the distribution of new wealth tends to do away that inequality, the greater will be the total mass of happiness.*

III. The third case requires us to examine the effect produced by a portion of wealth which is leaving the hands of its former possessor. Here, too, we must lay expectation out of view, and suppose the loss to be unforeseen;—and a loss almost always is so, because every man naturally expects to keep what he has. This expectation is founded upon the ordinary course of things. For in a general view of human affairs, wealth already acquired, is not only preserved, but increased. This is proved by the extreme difference between the primitive poverty of every community, and its actual wealth.

1st. *The loss of a portion of wealth will produce in the total happiness of the loser, a defalcation greater or less, according to the proportion of the part lost, to the part which remains.*

Take away from a man the fourth part of his fortune,

and you take away the fourth part of his happiness, and so on.\*

But there are cases in which the proportion would not be the same. If in taking away from me three fourths of my fortune, you take away what is necessary for my physical support, and if in taking away half of it you would have left that necessary portion untouched, the defalcation of happiness, instead of being twice as great in the first case as in the second, will be four times, ten times, indefinitely greater.

2d. *This granted, fortunes being equal, the greater the number of persons among whom a loss is shared, the less considerable will be the defalcation from the sum total of happiness.*

3d. *After passing a certain point, division renders the several quotas impalpable; and the defalcation in the sum total of happiness amounts to nothing.*

4th. *Fortunes being unequal, the loss of happiness produced by a given loss of wealth will become less, in proportion as the distribution of the loss shall tend towards the production of an exact equality.* But in this case we must lay out of view the inconveniences attendant on the violation of security.

Governments, profiting by the progress of knowledge, have favored in many respects, the principle of equality in the distribution of losses. It is thus that they have taken under the protection of the laws, *policies of insurance*, those useful contracts by which individuals assess themselves beforehand

\* It is to this head that the evils of deep play ought to be referred. Though the chances, so far as relates to money, are equal, in regard to pleasure, they are always unfavorable. I have a thousand pounds. The stake is five hundred. If I lose, my fortune is diminished one half; if I gain, it is increased only by a third. Suppose the stake to be a thousand pounds. If I gain, my happiness is not doubled with my fortune; if I lose, my happiness is destroyed; I am reduced to indigence.

to provide against possible losses. The principle of insurance, founded upon a calculation of probabilities, is but the art of distributing losses among so great a number of associates as to make them very light, and almost nothing.

The same spirit has influenced sovereigns, when they have indemnified at the expense of the state, those of their subjects who have suffered either by public calamities, or by the devastations of war. We have seen nothing of this kind wiser or better managed than the administration of the great Frederic. It is one of the finest points of view under which the social art can be considered.

Some attempts have been made to indemnify individuals for losses caused by the offences of malefactors. But examples of this kind are yet very rare. It is an object which merits the attention of legislators; for it is the means of reducing almost to nothing, the evil of offences which attack property. To prevent it from becoming injurious, such a system must be arranged with care. It will not do to encourage indolence and imprudence in the neglect of precautions against offences, by making them sure of an indemnification; and it is necessary to guard even more cautiously against fraud and secret connivances which might counterfeit offences, and even produce them, for the sake of the indemnity. The utility of this remedial process, would depend entirely on the way in which it was administered; yet the rejection of a means so salutary, can only originate in a culpable indifference, anxious to save itself the trouble of discovering expedients.

The principles we have laid down, may equally serve to regulate the distribution of a loss among many persons charged with a common responsibility. If their respective contributions correspond to the respective quantity of their fortunes, their relative state will be the same as before; but if it is desired to improve this occasion for the purposes of an approach towards equality, it is necessary to adopt a differ-

ent proportion. To levy an equal impost, without regard to differences of fortune, would be a third plan, which would be agreeable neither to equality nor security.

To place this subject in a clearer light, I shall present a mixed case, in which it is necessary to decide between two individuals, of whom one demands a profit at the expense of the other. The question is, to determine the effect of a portion of wealth, which passing into the hands of one individual under the form of gain, must come out of the hands of another, in the form of loss.

*1st. Among competitors of equal fortunes, when that which is gained by one must be lost by another, the arrangement productive of the greatest sum of good will be, that which favors the old possessor to the exclusion of the new demandant.*

For, in the first place, the sum to be lost, bearing a greater proportion to the reduced fortune, than the same sum to the augmented fortune, the diminution of happiness for the one, will be greater than the augmentation of happiness for the other; in one word, equality will be violated by the contrary arrangement.\*

In the second place, the loser will experience a pain of disappointment; the other, merely does not gain. Now the negative evil of not acquiring, is not equal to the positive evil of losing. If it were, as every man would experience this evil for all that he does not acquire, the causes of suffering would be infinite, and men would be infinitely miserable.

In the third place, men in general appear to be more sensitive to pain than to pleasure, even when the cause is equal. To such a degree indeed does this extend, that a loss which diminishes a man's fortune by one fourth, will take away more happiness than he could gain by doubling his property.

\* See the note upon gaming. This case is exactly the same.

2d. *Fortunes being unequal, if the loser is the poorer, the evil of the loss will be aggravated by that inequality.*

3d. *If the loser is the richer, the evil done by an attack upon security will be compensated in part, by a good which will be great in proportion to the progress towards equality.*

By the aid of these maxims, which, to a certain point, have the character and the certainty of mathematical propositions, there might be at last produced, a regular and constant art of indemnities and satisfactions. Legislators have frequently shown a disposition to promote equality, under the name of *equity*, a word to which a greater latitude has been given than to *justice*. But this idea of equity, vague and half developed, has rather appeared an affair of instinct than of calculation. It was only by much patience and method, that it was found possible to reduce to rigorous propositions, an incoherent multitude of confused sentiments.

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## CHAPTER VII.

### *Of Security.*

WE come now to the principal object of law,—the care of security. That inestimable good, the distinctive index of civilization, is entirely the work of law. Without law there is no security; and consequently, no abundance, and not even a certainty of subsistence; and the only equality which can exist in such a state of things, is an equality of misery.

To form a just idea of the benefits of law, it is only necessary to consider the condition of savages. They strive incessantly against famine; which sometimes cuts off entire

tribes. Rivalry for subsistence, produces among them the most cruel wars; and like beasts of prey, men pursue men, as a means of sustenance. The fear of this terrible calamity silences the softer sentiments of nature; pity unites with insensibility, in putting to death the old men who can hunt no longer.

Let us now examine what passes at those terrible epochs when civilized society returns almost to the savage state; that is, during war, when the laws on which security depends, are in part, suspended. Every instant of its duration is fertile in calamities; at every step which it prints upon the earth, at every movement which it makes, the existing mass of riches, the fund of abundance and of subsistence, decreases and disappears. The cottage is ravaged as well as the palace; and how often the rage, the caprice even of a moment, delivers up to destruction the slow produce of the labors of an age!

Law alone has done that which all the natural sentiments united, have not the power to do. Law alone is able to create a fixed and durable possession, which merits the name of property. Law alone can accustom men to bow their heads under the yoke of foresight, hard at first to bear, but afterwards, light and agreeable. Nothing but law can encourage men to labors superfluous for the present, and which can be enjoyed only in the future. Economy has as many enemies as there are dissipators,—men who wish to enjoy without giving themselves the trouble of producing. Labor is too painful for idleness; it is too slow for impatience. Fraud and injustice secretly conspire to appropriate its fruits. Insolence and audacity think to ravish them by open force. Thus security is assailed on every side; ever threatened, never tranquil, it exists in the midst of alarms. The legislator needs a vigilance always sustained, a power always in action, to defend it against this crowd of indefatigable enemies.



Law does not say to man, *Labor and I will reward you*, but it says, *Labor, and I will assure to you the enjoyment of the fruits of your labor,—that natural and sufficient recompense, which without me, you cannot preserve ;—I will ensure it, by arresting the hand—which may seek to ravish it from you.* If industry creates, it is law which preserves; if at the first moment we owe all to labor, at the second moment, and at every other, we are indebted for every thing to law.

To form a precise idea of the extent which ought to be given to the principle of security, we must consider that man is not like the animals, limited to the present, whether as respects suffering or enjoyment; but that he is susceptible of pains and pleasures by anticipation; and that it is not enough to secure him from actual loss, but it is necessary also to guarantee him, as far as possible, against future loss. It is necessary to prolong the idea of his security through all the perspective which his imagination is capable of measuring.

This presentiment, which has so marked an influence upon the fate of man, is called *expectation*. It is hence, that we have the power of forming a general plan of conduct; it is hence, that the successive instants which compose the duration of life, are not like isolated and independent points, but become continuous parts of a whole. *Expectation* is a chain which unites our present existence to our future existence; and which passes beyond us to the generation which is to follow. The sensibility of man extends through all the links of this chain.

The principle of security extends to the maintenance of all these expectations; it requires that events, so far as they depend upon laws, should conform to the expectations which law itself has created.

Every attack upon this sentiment produces a distinct and special evil, which may be called a *pain of disappointment*.

It is a proof of great confusion in the ideas of lawyers, that they have never given any particular attention to a sentiment which exercises so powerful an influence upon human life. The word *expectation* is scarcely found in their vocabulary. Scarce a single argument founded upon that principle, appears in their writings. They have followed it, without doubt, in many respects; but they have followed it by instinct, rather than by reason. If they had known its extreme importance, they would not have failed to name it, and to mark it, instead of leaving it unnoticed, in the crowd.

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## CHAPTER VIII.

### *Of Property.*

THE better to understand the advantages of law, let us endeavor to form a clear idea of *property*. We shall see that there is no such thing as natural property, and that it is entirely the work of law.

Property is nothing but a basis of expectation; the expectation of deriving certain advantages from a thing, which we are said to possess, in consequence of the relation in which we stand towards it.

There is no image, no painting, no visible trait, which can express the relation that constitutes property. It is not material, it is metaphysical; it is a mere conception of the mind.

To have a thing in our hands; to keep it; to make it; to sell it; to work it up into something else; to use it;—none of these physical circumstances, nor all united, convey the idea of property. A piece of stuff which is actually in the Indies may belong to me, while the dress I wear, may not.

The aliment which is incorporated into my very body, may belong to another, to whom I am bound to account for it.

The idea of property consists in an established expectation; in the persuasion of being able to draw such or such an advantage from the thing possessed, according to the nature of the case. Now this expectation, this persuasion, can only be the work of law. I cannot count upon the enjoyment of that which I regard as mine, except through the promise of the law which guarantees it to me. It is law alone which permits me to forget my natural weakness. It is only through the protection of law, that I am able to enclose a field, and to give myself up to its cultivation, with the sure though distant hope of harvest.

But it may be asked, what is it that serves as a basis to law, upon which to begin operations, when it adopts objects, which under the name of property, it promises to protect? Have not men, in the primitive state, a *natural* expectation of enjoying certain things,—an expectation drawn from sources anterior to law?

Yes. There have been from the beginning, and there always will be, circumstances, in which a man may secure himself by his own means, in the enjoyment of certain things. But the catalogue of these cases is very limited. The savage who has killed a deer, may hope to keep it for himself, so long as his cave is undiscovered; so long as he watches to defend it, and is stronger than his rivals; but that is all. How miserable and precarious is such a possession! If we suppose the least agreement among savages to respect the acquisitions of each other, we see the introduction of a principle to which no name can be given, but that of law. A feeble and momentary expectation may result from time to time, from circumstances purely physical; but a strong and permanent expectation can result, only from law. That which in the natural state was an almost invisible thread, in the social state, becomes a cable.

Property and law are born together, and die together. Before laws were made, there was no property; take away laws, and property ceases.

As regards property, security consists in receiving no check, no shock, no derangement to the expectation founded on the laws, of enjoying such and such a portion of good. The legislator owes the greatest respect to this expectation which he has himself produced. When he does not contradict it, he does what is essential to the happiness of society; when he disturbs it, he always produces a proportionate sum of evil.

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## CHAPTER IX.

### *Answer to an Objection.*

BUT perhaps the laws of property are good for those who have property, and oppressive to those who have none. The poor man perhaps, is more miserable than he would be without laws.

The laws, in creating property, have created riches only in relation to poverty. Poverty is not the work of the laws; it is the primitive condition of the human race. The man who subsists only from day to day, is precisely the man of nature, the savage. The poor man, in civilized society obtains nothing, I admit, except by painful labor; but in the natural state, can he obtain anything except by the sweat of his brow? Has not the chase its fatigues, fishing its dangers, and war its uncertainties? And if man seems to love this adventurous life; if he has an instinct warm for this kind of perils; if the savage enjoys with delight an idleness so dearly bought;—must we thence conclude that he is happier than our cultivators? No. Their labor is

more uniform, but their reward is more sure; the woman's lot is far more agreeable; childhood and old age have more resources; the species multiplies in a proportion a thousand times greater,—and that alone suffices to show on which side is the superiority of happiness. Thus the laws, in creating riches, are the benefactors of those who remain in the poverty of nature. All participate more or less in the pleasures, the advantages, and the resources of civilized society. The industry and the labor of the poor, place them among the candidates of fortune. And have they not the pleasures of acquisition? Does not hope mix with their labors? Is the security which the law gives, of no importance to them? Those who look down from above upon the inferior ranks, see all objects smaller; but towards the base of the pyramid, it is the summit which in turn, is lost. Comparisons are never dreamed of; the wish of what seems impossible, does not torment. So that in fact, all things considered, the protection of the laws may contribute as much to the happiness of the cottage as to the security of the palace.

It is astonishing that a writer so judicious as Beccaria, has interposed, in a work dictated by the soundest philosophy, a doubt subversive of social order. *The right of property*, he says, *is a terrible right, which perhaps is not necessary.* Tyrannical and sanguinary laws have been founded upon that right; it has been frightfully abused; but the right itself presents only ideas of pleasure, abundance, and security. It is that right which has vanquished the natural aversion to labor; which has given to man the empire of the earth; which has brought to an end the migratory life of nations; which has produced the love of country, and a regard for posterity. Men universally desire to enjoy speedily, to enjoy without labor. It is that desire, which is terrible; since it arms all who have not,

against all who have. The law which restrains that desire, is the noblest triumph of humanity over itself.

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## CHAPTER X.

### *Analysis of the Evils which result from Attacks upon Property.*

WE have already seen that subsistence depends upon the laws which assure to the laborer the produce of his labor. But it is desirable more exactly to analyze the evils which result from violations of property. They may be reduced to four heads.

1st, *Evil of non-possession.* If the acquisition of a portion of wealth is a good, it follows that the non-possession of it is an evil, though only a negative evil. Thus, although men in the condition of primitive poverty, may not have specially felt the want of a good which they knew not, yet it is clear that they have lost all the happiness which might have resulted from its possession, and of which we have the enjoyment. The loss of a portion of good, though we knew nothing of it, is still a loss. Are you doing me no harm, when by false representations you deter my friend from conferring upon me a favor which I did not expect? In what consists the harm? In the negative evil which results from not possessing that, which but for your falsehoods, I should have had.

2d. *Pain of losing.* Every thing which I possess, or to which I have a title, I consider in my own mind, as destined always to belong to me. I make it the basis of my expectations, and of the hopes of those dependent upon me; and I form my plan of life accordingly. Every part of my property may have in my estimation, besides its intrinsic

value, a value of affection, as an inheritance from my ancestors, as the reward of my own labor, or as the future dependence of my children. Every thing about it, represents to my eye that part of myself which I have put into it;—those cares, that industry, that economy, which denied itself present pleasures to make provision for the future. Thus our property becomes a part of our being, and cannot be torn from us, without rending us to the quick.

3d. *Fear of losing.* To regret for what we have lost, is joined inquietude as to what we possess, and even as to what we may acquire. For the greater part of the objects which compose subsistence and abundance being perishable matters, future acquisitions are a necessary supplement to present possessions. When insecurity reaches a certain point, the fear of losing prevents us from enjoying what we possess already. The care of preserving, condemns us to a thousand sad and painful precautions, which yet are always liable to fail of their end. Treasures are hidden or conveyed away. Enjoyment becomes sombre, furtive, and solitary. It fears to show itself, lest cupidity should be informed of a chance to plunder.

4th. *Deadening of industry.* When I despair of making myself sure of the produce of my labor, I only seek to exist from day to day. I am unwilling to give myself cares which will only be profitable to my enemies. Besides, the will to labor is not enough; means are wanting. While waiting to reap, in the mean time, I must live. A single loss may deprive me of the capacity of action, without having quenched the spirit of industry, or without having paralyzed my will. Thus the three first evils affect the passive faculties of the individual, while the fourth extends to his active faculties, and more or less benumbs them.

It appears from this analysis, that the two first evils do not go beyond the individual injured; while the two latter

spread through society, and occupy an indefinite space. An attack upon the property of an individual, excites alarm among other proprietors. This sentiment spreads from neighbor to neighbor, till at last the contagion possesses the entire body of the state.

*Power* and *will* must unite for the development of industry. *Will* depends upon encouragement; *power* upon means. These means are, what is called in the language of political economy, *productive capital*. When the question relates only to an individual, his productive capital may be annihilated by a single loss, while his spirit of industry is not extinguished, nor even weakened. When the question is of a nation, the annihilation of its productive capital is impossible; but a long time before that fatal term is approached, the evil may infect the will; and the spirit of industry may fall into a fatal lethargy, in the midst of natural resources offered by a rich and fertile soil. The will, however, is excited by so many stimulants, that it resists an abundance of discouragements and losses. A transitory calamity, though great, never destroys the spirit of industry. It is seen to spring up after devouring wars which have impoverished nations, as a robust oak, mutilated by tempests, repairs its losses in a few years and covers itself with new branches. Nothing is sufficient to deaden industry, except the operation of a domestic and permanent cause, such as a tyrannical government, bad legislation, an intolerant religion which drives men from the country, or a minute superstition which stupifies them.

A first act of violence, produces immediately a certain degree of apprehension; some timid spirits are already discouraged. A second violence, which soon succeeds, spreads a more considerable alarm. The more prudent begin to retrench their enterprises, and little by little, to abandon an uncertain career. In proportion as these attacks are repeated, and the system of oppression takes a more habitual



character, the dispersion increases. Those who fly are not replaced; those who remain, fall into a state of languor. Thus the field of industry, beaten by perpetual storms, at last, becomes a desert.

Asia Minor, Greece, Egypt, the coasts of Africa, so rich in agriculture, in commerce, and in population, at the flourishing epoch of the Roman empire, what have they become under the absurd despotism of the Turkish government? Palaces have been changed into cabins, and cities into hamlets. That government, odious to every thinking man, has never known that a state cannot grow rich except by an inviolable respect for property. It has never had but two secrets of statesmanship,—to sponge the people, and to stupify them. Thus the finest countries of the earth, wasted, barren, and almost abandoned, can hardly be recognised under the hands of barbarous conquerors.

These evils ought not to be attributed to foreign causes. Civil wars, invasions, natural scourges, may dissipate wealth, put the arts to flight, and swallow up cities. But choked harbors are opened again; communications are re-established; manufactures revive; cities rise from their ruins. All ravages are repaired by time, while men continue to be men; but there are no men to be found in those unhappy countries, where the slow but fatal despair of long insecurity, has destroyed all the active faculties of the soul.

If we trace the history of this contagion, we shall see its first attacks directed against that part of society which is easy and well off. Opulence is the object of the first depredations. Apparent superfluity vanishes little by little. Absolute need makes itself be obeyed in spite of obstacles. We must live; but when man limits himself to living, the state languishes, and the lamp of industry throws out only a dying flame. Besides, abundance is never so distinct from subsistence, that one can be destroyed without a dangerous blow at the other. While some lose only what is

superfluous, others lose a part of what is necessary ; for by the infinitely complicated system of economical connections, the opulence of a part of the citizens is the only fund upon which a part more numerous, depends for subsistence.

But another picture may be traced, more smiling and not less instructive. It is the picture of the progress of *security*, and of prosperity its inseparable companion. North America presents to us a most striking contrast. Savage nature may be seen there, side by side with civilized nature. The interior of that immense region offers only a frightful solitude, impenetrable forests or sterile plains, stagnant waters and impure vapors ; such is the earth when left to itself. The fierce tribes which rove through those deserts without fixed habitations, always occupied with the pursuit of game, and animated against each other by implacable rivalries, meet only for combat, and often succeed in destroying each other. The beasts of the forest are not so dangerous to man, as he is to himself. But on the borders of these frightful solitudes what different sights are seen. We appear to comprehend in the same view, the two empires of good and evil. Forests give place to cultivated fields ; morasses are dried up, and the surface grown firm is covered with meadows, pastures, domestic animals, habitations, healthy and smiling. Rising cities are built upon regular plans ; roads are constructed to communicate between them ; every thing announces that men, seeking the means of intercourse, have ceased to fear and to murder each other. Harbors filled with vessels, receive all the productions of the earth, and assist in the exchange of all kinds of riches. A numerous people, living upon their labor in peace and abundance, has succeeded to a few tribes of hunters, always placed between war and famine. What has wrought these prodigies ? Who has renewed the surface of the earth ? Who has given to man this domain over nature—over nature embellished, fertilized, and per-

fectad? That beneficent genius is *Security*. It is security which has wrought this great metamorphosis. And how rapid are its operations? It is not yet two centuries since William Penn landed upon those savage coasts with a colony of true conquerors, men of peace, who did not soil their establishments with blood, and who made themselves respected by acts of beneficence and justice.

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## CHAPTER XI.

### *Opposition between Security and Equality.*

IN consulting the grand principle of security, what ought the legislator to decree respecting the mass of property already existing?

He ought to maintain the distribution as it is actually established. It is this, which under the name of *justice* is regarded as his first duty. This is a general and simple rule, which applies itself to all states; and which adapts itself to all places, even those of the most opposite character. There is nothing more different than the state of property in America, in England, in Hungary and in Russia. Generally, in the first of these countries, the cultivator is a proprietor; in the second, a tenant; in the third, attached to the glebe; in the fourth, a slave. However, the supreme principle of security commands the preservation of all these distributions, though their nature is so different, and though they do not produce the same sum of happiness. How make another distribution without taking away from each, that which he has? And how despoil any, without attacking the security of all? When your new repartition is disarranged, that is to say, the day after its establishment, how avoid making a second? Why not correct it in the same way? And in the mean time, what

becomes of security? Where is happiness? Where is industry?

When security and equality are in conflict, it will not do to hesitate a moment. Equality must yield. The first is the foundation of life; subsistence, abundance, happiness, every thing, depends upon it. Equality produces only a certain portion of good. Besides, whatever we may do, it will never be perfect; it may exist a day; but the revolutions of the morrow will overturn it. The establishment of perfect equality is a chimera; all we can do is, to diminish inequality.

If violent causes, such as a revolution of government, a division, or a conquest, should bring about an overturn of property, it would be a great calamity; but it would be transitory; it would diminish; it would repair itself in time. Industry is a vigorous plant which resists many amputations, and through which a nutritious sap begins to circulate, with the first rays of returning summer. But if property should be overturned with the direct intention of establishing an equality of possessions, the evil would be irreparable. No more security, no more industry, no more abundance! Society would return to the savage state whence it emerged.

If equality ought to prevail to-day, it ought to prevail always. Yet it cannot be preserved except by renewing the violence by which it was established. It will need an army of inquisitors and executioners, as deaf to favor as to pity; insensible to the seductions of pleasure; inaccessible to personal interest; endowed with all the virtues, though in a service which destroys them all. The levelling apparatus ought to go incessantly backward and forward, cutting off all that rises above the line prescribed. A ceaseless vigilance would be necessary to give to those who had dissipated their portion, and to take from those who by labor had augmented theirs. In such an order of things, there would be only one wise course for the governed,—that of propi-

gality; there would be but one foolish course,—that of industry. This pretended remedy, seemingly so pleasant, would be a mortal poison, a burning cautery, which would consume, till it destroyed the last fibre of life. The hostile sword in its greatest furies, is a thousand times less dreadful. It inflicts but partial evils, which time effaces, and industry repairs.

Some small societies, in the first effervescence of religious enthusiasm, have established the community of goods as a fundamental principle. Does any one imagine that happiness was gained by that arrangement? For the sweet power of reward, is substituted the sad impulses of pain. Labor, so easy and so light, when animated by hope, it is necessary under these systems to represent, as a penitential means of escaping eternal punishment. So long as the religious impulse preserves its power, all labor, but all groan. So soon as it begins to grow weak, the society divides into two classes: one composed of degraded fanatics, contracting all the vices of an unhappy superstition; the others, lazy rogues, who are supported in a holy indolence by the dupes who surround them. The word equality becomes a mere pretext,—a cover to the robbery which idleness perpetrates upon industry.

Those ideas of benevolence and of concord which have seduced some ardent souls into an admiration of this system, are only chimeras of the imagination. In the distribution of labors, what motive could determine any to embrace the more painful? Who would undertake gross and disagreeable functions? Who would be content with his lot? Who would not find the burden of his neighbor lighter than his own? How many frauds would be contrived, in order to lay upon others the labor from which all would endeavor to exempt themselves. And in the division, how impossible to satisfy all; to preserve the appearances of equality; to prevent jealousies, quarrels, rivalries, prefer-

ences. Who would settle the numberless disputes forever breaking out? What an apparatus of penal laws would be necessary as a substitute for the sweet liberty of choice, and the natural recompense of labor! One half the society would not suffice to regulate the other half. Thus this absurd and unjust system would only be able to maintain itself by means of a political and religious slavery such as that of the Helots at Lacedæmon, and the Indians of Paraguay, in the establishments of the Jesuits. Sublime invention of legislators, which, to accomplish a plan of equality, makes two corresponding lots of good and of evil, and puts all the pain on one side, and all the enjoyment on the other!

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## CHAPTER XII.

### *Means of uniting Security and Equality.*

Is it necessary that between these two rivals, *Security* and *Equality*, there should be an opposition, an eternal war? To a certain point they are incompatible; but with a little patience and address, they may in a great measure be reconciled.

The only mediator between these contrary interests, is, time. Do you wish to follow the counsels of equality, without contravening those of security?—await the natural epoch which puts an end to hopes and fears, the epoch of death.

When property by the death of the proprietor, ceases to have an owner, the law can interfere in its distribution, either by limiting in certain respects the testamentary power, in order to prevent too great an accumulation of

wealth in the hands of an individual; or by regulating the succession in favor of equality, in cases where the deceased has left no consort, nor relation in the direct line, and has made no will. The question then relates to new acquirers, who have formed no expectations; and equality may do what is best for all, without disappointing any. At present, I only indicate the principle: the development of it may be seen in the second book.

When the question is, to correct a kind of civil inequality, such as slavery, it is necessary to pay the same attention to the right of property; to submit it to a slow operation; and to advance towards the subordinate object without sacrificing the principal object. Men who are rendered free by these gradations, will be much more capable of being so, than if you had taught them to tread justice under foot, for the sake of introducing a new social order.

It is worthy of remark, that in a nation prosperous in its agriculture, its manufactures, and its commerce, there is a continual progress towards equality. If the laws do nothing to combat it, if they do not maintain certain monopolies, if they put no shackles upon industry and trade, if they do not permit entails, we see great properties divided little by little, without effort, without revolution, without shock, and a much greater number of men coming to participate in the moderate favors of fortune. This is the natural result of the opposite habits which are formed in opulence and in poverty. The first, prodigal and vain, wishes only to enjoy without labor; the second, accustomed to obscurity and privations, finds pleasures even in labor and economy. Thence the change which has been made in Europe by the progress of arts and commerce, in spite of legal obstacles. We are at no great distance from those ages of feudality, when the world was divided into two classes: a few great proprietors, who were everything, and a multitude of serfs, who were nothing. These pyramidal

heights have disappeared or have fallen; and from their ruins, industrious men have formed those new establishments, the great number of which attests the comparative happiness of modern civilization. Thus we may conclude that *Security*, while preserving its place as the supreme principle, leads indirectly to *Equality*; while equality, if taken as the basis of the social arrangement, will destroy both itself and security, at the same time.

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### CHAPTER XIII.

#### *Sacrifice of Security to Security.*

THIS title appears at first enigmatical, but the sense of the enigma may easily be found.

There is an important distinction between the ideal perfection of security, and its practicable perfection. The first would demand that nothing should ever be taken from any body. The second is satisfied, if nothing is taken beyond what is necessary for the preservation of the rest.

This sacrifice is not an attack upon security; it is simply a defalcation. An attack is an unexpected shock; an evil which cannot be calculated, an irregularity which has no fixed principle. It seems to put all the rest in peril; it produces a general alarm. But a defalcation is a fixed, regular, and necessary deduction, which is expected; which produces only an evil of the first order; but no danger, no alarm, no discouragement to industry. The same sum of money, according to the way in which it is levied, will have one or the other of these characters; and will consequently produce either the deadening effects of insecurity, or the vivifying results of confidence.



The necessity of these defalcations is evident. To labor, and to guard the laborers, are two different operations, which cannot be performed at the same time, by the same persons. It is necessary that those who produce wealth by labor, should lay aside some portion of it, to support the guardians of the state. Wealth can only be defended at its own expense.

Society, attacked by enemies, whether foreign or domestic, can only maintain itself at the expense of security,—not the security of those enemies alone, but the security even of the very persons to whom protection is extended.

If there are men who do not perceive this necessary connection, it is because in this matter, as in many others, the want of to-day eclipses that of yesterday. The whole of government is but a tissue of sacrifices. The best, is that in which these sacrifices are reduced to their lowest term. The practical perfection of security, is a quantity which tends without ceasing to approach an ideal perfection.

“It is not necessary to increase the real wants of the people, to satisfy imaginary wants of state.”

“Imaginary wants are those created by the passions and the weaknesses of men who govern, by the charm of an extraordinary project, the disordered love of empty glory, and a certain powerlessness of mind to resist the suggestions of fancy. It has often happened that unquiet spirits, placed by the prince at the head of affairs, have imagined that the wants of their own little souls were wants of the state.”\*

The author of the *Persian Letters* has written too many chapters in the *Spirit of Laws*. What do we learn from this satirical description? If Montesquieu had condescended to give us a simple enumeration of the true wants of the state, we should have known much better what he meant by imaginary wants.

\* *Spirit of Laws*, book xiii. c. i.

I proceed to give a catalogue of the cases, in which the sacrifice of some portion of security, so far as property is concerned, is necessary, to preserve the greater mass of it.

1. General wants of the state, for its defence against exterior enemies.

2. General wants of the state for its defence against violators of the laws, or internal enemies.

3. General wants of the state to furnish means of affording aid in cases of physical calamity.

4. Amends levied upon delinquents, either as punishment, or as an indemnity in favor of the parties injured.

5. A tax upon the property of individuals to furnish the ability of applying remedies to the evils above mentioned, by means of courts of justice, institutions of police, and an armed force.

6. Limitation of the rights of property, or of the use which each proprietor may make of his own goods, so as to prevent him from employing them to his own injury or to that of others.\*

\* We possess a general right of property over a thing when we can apply it to every use, except certain uses which are forbidden for special reasons. These reasons may be referred to three heads:—

1st. Private detriment, when a given use of a thing would injure some other individual, either in his fortune or otherwise.

2d. Public detriment, that which may result to the community in general.

3d. Detriment to the individual himself.

This sword is mine in full property; but however complete that right of property may be, as respects a thousand uses, I ought not to employ it to wound my neighbor, nor to cut his dress, nor to hold it up as a signal of insurrection. If I am a minor or a maniac, it may be taken from me, lest I should injure myself.

An absolute and unlimited right of property over any object, would be the right to commit almost every crime. If I had such a right over a stick which I had cut, I might employ it as a club to beat the passers-by, or convert it into a sceptre as a sign of royalty, or into an idol offensive to the national religion.

In all these cases the necessity is too palpable to need any proofs. But it must be noticed that the same reserves will equally apply to the other branches of security. It is not possible, for example, to maintain the rights of person and of honor, except by penal laws; and penal laws can hardly be executed, except at the expense of person or of honor.

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## CHAPTER XIV.

### *Of some cases liable to be contested.*

UGHT we to reckon among those wants of the state which ought to be provided for by forced contributions, the care of the indigent, public worship, and the cultivation of the arts and sciences?

### SECTION I.

#### *Indigence.*

In the highest state of social prosperity, the great mass of citizens will have no resource except their daily industry; and consequently will be always near indigence, always ready to be thrown into a state of destitution, by accidents, such as revolutions of commerce, natural calamities, and especially sickness. Infancy has no means of subsisting by its own strength; the feebleness of old age is equally destitute. These two extremes of life are alike in weakness. If natural instinct, humanity, shame, and the aid of the law assure to children and old men the care and protection of their relatives, still these resources are precarious, and those who give, may soon themselves be reduced to want. A

numerous family supported in abundance by the labor of the father and mother, may lose at any instant, half its resources by the death of one parent, and the whole by the death of the other.

Old age is yet worse provided for. Love which descends, has more force than love which ascends. Gratitude is less powerful than instinct. Hope attaches to feeble beings who are beginning life; it promises nothing for those who are ending it. But suppose, what is not uncommon, suppose all possible care for the old; the idea of changing the part of a giver for that of a receiver, will always shed more or less of bitterness into the benefits received,—especially at that epoch of decline when the morbid sensibility of the soul renders painful changes indifferent in themselves.

This aspect of society is the saddest of all. It presents that long catalogue of evils which end in indigence, and consequently in death, under its most terrible forms. This is the centre toward which inertia alone, that force which acts without relaxation, makes the lot of every mortal gravitate. Not to be drawn into the abyss, it is necessary to mount up by a continual effort; and we see by our side, the most diligent and the most virtuous, sometimes slipping by one false step; and sometimes thrown headlong by inevitable reverses.

There are only two means, independently of the laws, of making head against these evils; viz., *savings*, and *voluntary contributions*.

If these two resources would always suffice, we ought by all means to avoid any legal interference for the succor of the poor. A law which offers to indigence an aid independent of industry, is, to a certain extent, a law against industry; or at least against frugality. The motives to labor and economy, are, present need, and the fear of future need. The law which takes away that need, and that fear, is an

encouragement to idleness and dissipation. Such is the reproach which is cast, and not without reason, upon most of the establishments created in favor of the poor.

But a slight examination will be enough to convince us that the two means of succor independent of the laws, are not sufficient.

With respect to *savings*—if the greatest efforts of industry will not suffice for the daily support of a numerous class, how can that class lay by for the future? A second class may pay their daily expenses by their daily labor; but they will have nothing superfluous to lay aside against the necessities of a distant day. There will remain then, only a third class, which by economizing during the age of labor, may perhaps be able to provide for the time when they can labor no longer. It is only these last to whom poverty can be ascribed as a sort of crime. "Economy," it will be said, "is a duty. If they have neglected it, so much the worse for them. If misery and death await them, they have nobody to accuse but themselves. Their catastrophe however will not be an unmixed evil. It will serve as a lesson to prodigals. It is the execution of a law established by nature; a law which is not, like that of men, subject to uncertainty or injustice. Punishment does not fall save on the guilty, and it is exactly proportioned to the fault."

This severe language might be justifiable, if the object of the law were, vengeance. But vengeance is condemned by the principle of utility, as an impure motive founded upon antipathy. What will be the fruit of these evils, this abandonment and this indigence, which you regard in your anger as a just punishment of prodigality? Are you sure that these sacrificed victims will prevent, by their example, the faults which have led them into misfortune? To think so, would manifest a great ignorance of the human heart. The distress, the death of some prodigals, if we ought so to

call those unfortunates who have not known how to deny themselves some of the little pleasures of their condition, who have not known the painful art of striving by reflection against the temptations of every moment,—their distress, I say, even their death, will have but little influence, in the way of instruction, upon the laborious classes of society. That sad spectacle, the details of which for the most part, would be concealed by shame, would not, like the punishment of malefactors, have a publicity which would attract a general attention, and not suffer its cause to be unknown. Would those to whom the lesson was most necessary, know how to give a fit interpretation to the event? Would they always seize upon the supposed connection between imprudence, as the cause, and misfortune, as the effect? Might they not attribute the catastrophe to accidents unforeseen, and impossible to be foreseen? In place of saying,—Here is a man who has been the author of his own destruction; his indigence ought to impel me to labor and frugality,—would they not often say, and with apparent reason,—Here is an unfortunate man, who has given himself a deal of trouble to no purpose, and whose case is a striking proof of the vanity of human prudence! This would be bad reasoning, no doubt; but must an error of logic be punished so rigorously,—a mere want of reflection, and that too in a class of men more often called upon to exercise their muscles than their minds?

Besides, what shall we think of a punishment, delayed in its execution, till the very end of life, and which must begin to vanish at the other extremity of it, that is, in youth, the influence of the most imperious motives? How feeble grows this pretended lesson, in the distance! How little resemblance there is between the old man and the young man! What is the example of the one to the other? In youth, the idea of immediate good or evil, occupying all

the sphere of reflection, excludes the idea of distant good and evil. If you wish to act upon the young, place the motive near. Show them, for example, a marriage or some other pleasure, in perspective. But a pain placed at a distance beyond their intellectual horizon, is quite thrown away. You want to determine men who think very little; and to draw instruction from the misfortunes of others, it is necessary to think much. To what purpose employ a political means, designed to operate upon a class having the least foresight, and yet of a nature to be efficacious only with philosophers?

To recapitulate. The resource of savings is insufficient. 1st. It evidently is so for those who do not gain enough to subsist upon. 2d. It is equally so for those who gain a mere subsistence. As to the third class, which embraces all not included in the first two, savings are not naturally insufficient, but they become so through the deficiency of human prudence.

Let us now pass to the other resource, *voluntary contributions*. That too has many imperfections.

1. Its uncertainty. It will experience daily vicissitudes, like the fortune and the liberality of the individuals on whom it depends. Is it insufficient? Such junctures are marked by misery and death. Is it superabundant? It will offer a reward to idleness and profusion.

2. The inequality of the burden. This supply for the wants of the poor is levied entirely at the expense of the more humane and the more virtuous, often without any proportion to their means, while the avaricious calumniate the poor, to cover their refusal with a varnish of system and of reason. Such an arrangement is a favor granted to selfishness, and a punishment to humanity, that first of virtues.

I say a punishment;—for though these contributions are called voluntary, what is the motive whence they emanate? If it is not a religious or a political fear, it is sympathy,

tender but sad, which presides over these generous actions. It is not the hope of a pleasure which is bought at this price; it is the torment of pity, which is sought to be avoided. Thus it has been noticed in Scotland, a country where indigence is limited to this sad resource, that paupers derive their principal support from the class nearest to pauperism.

3. The inconveniences of the distribution. If these contributions are abandoned to chance, as in the case of alms asked on the highway;—if they are left to be paid as occasion occurs, without any person intermediate between him who gives and him who asks, the uncertainty as to the sufficiency of these gifts, is aggravated by another uncertainty. How appreciate in a multitude of cases, the degree of want and of need? May not the poor widow's farthing go to increase the ephemeral treasure of the impure woman? How many generous souls, like Sidney, will be found, who will repel the vivifying draught from their parched lips, to say, *I can yet wait; first minister to that unfortunate; for his distress is greater than mine.* Every one knows that in the distribution of these gratuitous gifts, it is not modest virtue, it is not true poverty, often mute and bashful, which obtains the larger part. There needs as much of management and intrigue to succeed upon this obscure theatre, as upon the brilliant scene of the world. He who knows how to importune, to flatter, to lie, to mix boldness with baseness, and to vary his impostures, according to the occasion, will have success, such as the virtuous poor, devoid of artifice, and preserving their honor in their poverty, will not attain.

*Les vrais talents se taisent et s'enfuient,  
Decourages des affronts qu'ils essaient.  
Les faux talents sont hardis, effrontés,  
Souples, adroits, et jamais rebutes.*

Discouraged by affronts, true talents fly,  
And hide themselves in silence. Hardy and bold,  
Adroit and supple too, false talents brave  
Repulses.



What Voltaire says of talents, may be applied to mendicity. In the division of voluntary contributions, the lot of the honest and virtuous poor is seldom equal to that of the impudent and obstreperous beggar.

Suppose that these contributions are put into a common fund, to be distributed by persons appointed for that purpose. This method is far preferable, since it admits a regular examination of wants and claims, and tends to proportion the aid accordingly; but it has also a tendency to diminish liberalities. That gift which is going to pass through the hands of a stranger, of which I shall not follow the application, of which I shall not have the pleasure nor the immediate merit, has something abstract about it, which chills sentiment. That which I give myself, I give at the moment when I am moved, when the cry of the poor is echoed in my heart, when there is only I, to succor him. What I put into a general contribution may not have a destination agreeable to my desires; that poor coin which is much for me and my family, will be but a drop to that mass of contributions on the one hand, and that multitude of wants on the other—let the rich sustain the poor! This is the way that many people reason; and it is on this account that contributions succeed better when taken for a particular class of individuals, than for an indefinite multitude like the entire mass of the poor. Yet it is for that mass, that a permanent aid must be provided.

It seems to me, after these observations, that we may lay it down as a general principle, that the legislator ought to establish a regular contribution for the wants of indigence; it being understood that those only are to be regarded as indigent who are in want of what is absolutely necessary. From this definition of the indigent it follows, that their title as indigent, is stronger than the title of the proprietor of superfluities, as proprietor. For the pain of death which would presently fall upon the starving poor, would be always a

more serious evil than the pain of disappointment which falls upon the rich when a portion of his superfluity is taken from him.\*

In the amount of the legal contribution, we ought not to go beyond what is simply necessary. To go beyond that, would be taxing industry for the support of idleness. Those establishments which furnish more than is absolutely necessary are not good, except so far as they are supported at the expense of individuals; for individuals can make a discrimination in the distribution of these aids, and apply them to specific classes.

The details of the manner of assessing this contribution, and distributing its produce, belong to political economy; as also the inquiry into the means of encouraging a spirit of economy and foresight in the lower classes of society. We have some instructive memoirs upon this interesting subject, but no treatise which embraces the whole question. Such a work should begin with the theory of poverty, that is, by a classification of the indigent, and of the causes which bring on indigence, and thence proceed to suggest precautions and remedies.

## SECTION II.

### *The expenses of Public Worship.*

If the ministers of religion are considered as charged with maintaining one of the sanctions of morality, (the religious sanction,) the expense of their support ought to be referred to the same branch of administration with justice and the police, viz., the support of internal security. The clergy

\* When this tax is put upon a regular footing, and each proprietor knows beforehand what he must contribute, the pain of disappointment vanishes, and gives place to another, different in its nature, and less in degree.

are a body of inspectors and moral instructors, who form, so to speak, the advanced guard of the law. They have no power against offences, but they combat the vices from which offences originate, and thus render the exercise of authority more rare, by maintaining morals and subordination. If they were charged with all the functions which might properly be assigned to them, in the education of the inferior classes, in the promulgation of the laws, in the performance of divers public acts; the utility of their ministry would be more manifest. The more real services they rendered to the state, the less would they be subject to those maladies of dogmatism and of controversy, which spring from the desire of making themselves distinguished, and from the want of power to be useful. It is necessary to direct their activity and their ambition towards salutary objects, to prevent them from becoming mischievous.

In this point of view, even those who do not acknowledge the truth of religion, cannot complain at being called upon to contribute towards its support, since they participate in its advantages.

But if there exists a great diversity of worship and religion, and the legislator is not fettered by an anterior establishment or particular considerations, it will be more conformable to liberty and equality to apply the contributions of each religious community to the support of their own church. It is true, that in this arrangement we have cause to fear a spirit of proselytism on the part of the clergy; but it is equally probable that a useful emulation will result from their reciprocal efforts, and that the balance of their influence will establish a kind of equilibrium, in that fluid of opinions subject to such dangerous tempests.

We can imagine a very unfortunate case, that of a people to whom the legislator forbids the public exercise of their religion, and at the same time, imposes upon them the obligation of supporting a religion which they regard as hostile to

their own. This would be a double violation of security. There would gradually be formed among this people, an habitual sentiment of hatred against the government, a desire of change, a ferocious courage, a profound secrecy. The people, deprived of all the advantages of a public religion, of known guides and of avowed priests, would be delivered up to ignorant and fanatical leaders; and as the maintenance of their worship would be a school of conspiracy, the faith of oaths, instead of being the safeguard of the state, would become its terror; instead of binding the citizens to the government, it would unite them against it; so much so, that such a people would become as formidable through their virtues, as their vices. This is not an imaginary case, as the history of Ireland will show.

### SECTION III.

#### *The cultivation of the Arts and Sciences.*

I shall not speak here of what ought to be done for what are called the *useful arts and sciences*; nobody doubts, that objects of public utility ought to be sustained and encouraged by public contributions.

But when the question relates to the cultivation of the fine arts, the embellishment of a country, edifices of luxury, objects of ornament and pleasure, in one word, to works of superfluity; ought we to raise forced contributions for their support? Can taxes be justified for this brilliant but superfluous end?

I do not desire to undertake here the support of the agreeable against the useful; \* nor to argue that the people

\* Not that there is any real opposition between them; every thing that gives pleasure is useful; but in common language, that is exclusively called useful which produces a permanent utility; while

should be distressed in order to give fêtes to a court, or pensions to buffoons. But one or two reflections may be offered by way of apology.

1. The expense which is, or can be incurred for these objects, is commonly a trifling affair compared to the mass of necessary contributions. Let any one undertake to restore to each his quota of this superfluous expense, and would it not be almost impalpable?

2. This superfluous part of the contributions, being confounded with the mass of those which are necessary, the levy is imperceptible; it excites no separate sensation, which can give room to a distinct complaint; and the evil of the first order, limited to a sum so moderate, is not sufficient to produce an evil of the second order.

3. This luxury of taste may have a palpable utility by bringing together a concourse of strangers, who spend their money in the country. Little by little, all nations become tributary to her who holds the sceptre of the fashions. A country fertile in amusements may be looked upon as a great theatre, which is in part supported at the expense of a crowd of curious spectators, drawn to it from all parts.

It may happen too, that this pre-eminence in objects of amusement, literature and taste, tends to gain for a people the good will of other nations. Athens, which was called the eye of Greece, was saved more than once, by the sentiment of respect which superiority of civilization inspired. The halo of glory which encircled that home of the arts, served a long time to hide its weakness; and every thing which was not barbarian, was interested in the preservation of a city, the centre of politeness, and of intellectual pleasures.

the word *agreeable* is limited to an immediate utility, or a present pleasure. Many things, in fact, which we refuse to call *useful*, have a much more certain utility than some others, to which that epithet is usually applied.

But after all, it must be admitted, that this seducing object may be abandoned without risk, to the sole resource of voluntary contributions. At least, every thing essential ought to be provided for, before giving one's self up to expenses of pure ornament. It will be time to provide for actors, painters and architects, after the public faith is satisfied; when individuals have been indemnified for the losses occasioned by war, crimes and physical calamities; when the support of the indigent is provided for; till then, all such expense would be an unjust preference granted to brilliant accessaries, over objects of necessity.

Such expenses, under such circumstances, are very contrary to the interest of a sovereign, because the reproaches they occasion will always be much exaggerated; for it needs no sagacity to invent them, but only passion and humor to set them distinctly forth. It is well known what efficacy they have had, when wrought into pieces of popular eloquence, and employed to stir up the people against regal government. Though it be true that every thing conspires to throw kings into this illusion,—so far as regards the luxury of amusements, have they ever fallen into excesses so great as those of many republics? Athens, at an epoch of most pressing dangers, despised alike the eloquence of Demosthenes and the threats of Philip, engrossed with a need more urgent than defence, an object more essential than the maintenance of liberty. The gravest of crimes was the diversion, even for wants of the state, of the funds destined to the support of the theatres. And at Rome, was not the passion for spectacles carried to an equal extreme? It was necessary to lavish the treasures of the world, and the spoils of nations, to captivate the suffrages of the sovereign people. Terror spread through a whole country, whenever a proconsul was about to give a spectacle at Rome; an hour of the magnificences of the circus, cast into despair an hundred thousand inhabitants of the provinces.

## CHAPTER XV.

*Examples of attacks upon Security.*

It will be useful to give some examples of what I mean by *attacks upon security*. It will be a means of putting principles in a clearer light, and of showing that what is unjust in morals, cannot be innocent in politics. Nothing is more common than to authorize under one name, what would be odious under another.

And here I cannot help observing the bad effects of one branch of classical education. We are accustomed from our earliest youth, to see in the history of the Roman people, public acts of injustice, atrocious in themselves, always colored with specious names, always accompanied by a proud eulogy on Roman virtues. The abolition of debts plays a great part from the earliest times of the republic. A withdrawal of the people to Mount Aventine, when the enemy was at the gates of Rome, forced the Senate to pass a sponge over the rights of creditors. The historian excites all our interest in favor of the fraudulent debtors, who paid their debts by a bankruptcy, and does not fail to render odious, those who were despoiled by an act of violence. And what was gained by that injustice? Usury, which had served as a pretext for the robbery, could not but be augmented the very next day after the catastrophe; for the exorbitant rate of interest was only the price of the risk caused by the uncertainty of engagements. The foundation of the Roman colonies has been celebrated as a work of profound policy. It always consisted in despoiling a part of the lawful proprietors of a conquered country, to create establishments in the way of favor or reward.

This proceeding, so cruel in its immediate effects, was yet more fatal in its consequences. The Romans, accustomed

to violate all the rights of property, knew not where to check themselves in this career. Thence the perpetual demand for a new division of lands, which was ever the fire-brand of the seditious, and which contributed under the triumvirate, to a frightful system of general confiscations.

The history of the republics of Greece is full of facts of the same kind, always presented in a manner plausible enough to lead astray superficial inquirers. What abuse of reasoning has there been upon that division of lands brought about by Lycurgus, to serve as a basis for his community of warriors; in which by an inequality the most shocking, all the rights are on one side, and all the servitude on the other!

These *attacks upon security*, which have found so many officious defenders when the question has been of the Greeks and the Romans, have not experienced the same indulgence when the monarchs of the East have been the actors. The despotism of an individual has nothing seducing in it; because it confines itself too evidently to his person alone; there are a million chances of suffering from it, to one of enjoying. But the despotism exercised by a multitude, deceives weak minds by a false image of the public good. We place ourselves in imagination, among the great number that commands, instead of supposing ourselves among the small number that yields and suffers. Let us then leave in peace the sultans and the viziers. We may be sure that their injustice will not be glossed over by the flatteries of historians. Their reputation serves as an antidote to their example.

We may dispense, for the same reason, with insisting upon such attacks upon security as national bankruptcies; but we may remark in passing, a curious effect of fidelity to engagements upon the authority of the government itself. In England, since the Revolution, the engagements of the state have always been sacred; so that individuals who lend



to the government, never demand any other pledge than the national credit; and the collection of the imposts assigned to pay the interest of the debt, has always remained in the hands of the king. In France, under the monarchy, violations of the public faith were so frequent, that those who made advances to the government, were in the habit, from an early period, of requiring the collection of the imposts to be entrusted to them, and of paying themselves with their own hands. But this arrangement cost the people dear; for the public creditor had no interest to consult their convenience; and it cost the prince yet dearer; since it deprived him of the affections of the people. When, in 1787, the announcement of a deficient revenue alarmed all the creditors of the state, that class so interested in England, in the maintenance of government, showed itself in France, ardent for a revolution. All thought they saw their only security in taking away from the sovereign the administration of the finances, and placing them in the hands of a national council. It is well known how far the event answered to their hopes. But it is not the less interesting to observe that the fall of that monarchy which appeared so immovable, was owing in no small measure, to the distrust which so many violations of the public faith had caused.

But among the many *attacks upon security* committed through ignorance, inadvertence or false reasons, it will suffice to note some individual cases.

1. We may regard as such, *taxes unequally levied*,—those disproportioned imposts which spare the rich at the expense of the poor. The weight of this evil is aggravated by the sentiment of injustice at the idea of paying more than one's fair proportion.

*Corvées* are the height of inequality; since they fall entirely upon those who have only their hands for their patrimony.

So are imposts levied upon an uncertain fund ; upon persons who may have nothing to pay with. In that case, the evil takes another turn. Indigence may protect us from paying the tax, but it subjects us at the same time, to the gravest evils. The sufferings of want, take the place of the inconveniences of the impost. This is the reason why a poll tax is so unjust. It is possible to have a head, and to have nothing else.

Imposts which fetter industry, such as monopolies, and exclusive companies. The true method of estimating these imposts is, not to consider what income they pay, but what they prevent from being paid.

Imposts upon necessities. What physical privations, what maladies, what deaths they produce, no man can tell ! These sufferings, caused by the fault of the government, are confounded with natural evils, which it cannot prevent.

Imposts upon private sales. Generally speaking, it is necessity which causes these sales ; and the tax-gatherer, coming in at an epoch of distress, levies an extraordinary tribute upon an unfortunate individual.

Imposts upon public sales, or sales at auction. Here the distress is fully proved ; often it is extreme, and the fiscal injustice is most manifest.

Taxes upon law proceedings. They include all kinds of attacks upon security, since they are equivalent to refusing the protection of the law to all those who cannot pay for it. They consequently offer a hope of impunity to crime. It is only necessary to choose as objects of injustice, individuals who cannot afford the advances necessary to a judicial prosecution, or who are not rich enough to run the risk.

2. *A forced elevation of the value of money.* This is a bankruptcy, since the government does not pay all that it owes ; a fraudulent bankruptcy, since there is a semblance

of paying; and a foolish fraud, which deceives nobody. As far as it goes, it is equivalent to an abolition of debts. The theft which the government commits upon its own creditors, it authorizes every debtor to commit upon his, though without any profit from it to the public treasury. And when this course of injustice is completed; after this operation has enfeebled confidence, ruined honest men, enriched rogues, deranged commerce, disordered taxation, and caused a thousand individual evils, it does not leave the least advantage to the government which it has dishonored. Expense and income presently return to the same proportions as before.

3. *Forced reduction of the rate of interest.* Regarded as a question of political economy, reducing the rate of interest by law, is injurious to wealth, because it is prohibiting the payment of any premium for the introduction of foreign capital; it is prohibiting, in many cases, new branches of commerce, and even old ones, if the legal interest is not sufficient to balance the risks of the capital employed. But with a more immediate view to security, it is taking away from lenders to give to borrowers. Let the rate of interest be reduced by law a fifth part below its natural level, and the event is the same to the lenders, as if they were plundered every year by robbers, of the fifth part of their fortunes.

If the legislator finds it good to take away from a particular class of citizens a fifth part of their revenue, why stop there? Why not take away another fifth part, and still another? If the first reduction answered its end, a further reduction will answer it, in the same proportion; and if the measure is good in one case, why should it be bad in the other? Wherever we stop, it is necessary to have a reason for stopping; but whatever reason prevents the second step, will be just as good to prevent the first. This operation is exactly the same as diminishing rents, under the pretext

that the proprietors are useless consumers, and the farmers, productive laborers. If you shake the principle of security as respects one class of citizens, you shake it for all. The bundle of rods is its emblem.

4. *General confiscations.* I refer to this head, vexations exercised upon a sect, upon a party, upon a class of men, under the vague pretext of some political crime; a pretext so vague, that while it is pretended that the confiscation is a punishment, there is often room to believe that the crime has been created for the sake of the confiscation. History presents many examples of such robbery. The Jews have often been its object; they were too rich not to be always guilty. Financiers and farmers of the public revenue, for the same reason, have been often subjected to what were called *chambers of fire*, (*chambres ardentes*.) While the order of succession remained unfixed, every body at the sovereign's death, might become guilty; and the spoils of the vanquished, formed in the hands of the successor, a treasure of rewards. In a republic torn by factions, each half of the nation denounces the other, as traitors; and let the system of confiscations be once introduced, and parties, as at Rome, become in turn, the devourers of each other.

The crimes of the powerful, and especially the crimes of the popular party in democracies, have always found apologists. "The greater part of these great fortunes, it is said, have been founded upon injustice; and what has been plundered from the public may as well be restored to the public." To reason in this way, is to open an unlimited career to tyranny. It is a permission to presume crime instead of proving it. According to this logic, it is impossible for a rich man to be innocent. Ought a punishment so severe as confiscation to be inflicted in gross, without examination, without detail, without proof? Does a procedure which would be declared atrocious if employed against an individual, become lawful when directed against a whole

class of citizens? Can we make ourselves deaf to the evil we are doing, because of the number of the sufferers whose cries are mingled together in this common shipwreck? To plunder great proprietors under the pretext that some of their ancestors have acquired their opulence by unjust means, is like bombarding a city, because some robbers are thought to be concealed in it.

5. *Dissolution of convents and of monastic orders.* The decree for their abolition was signed by reason itself; but its execution should not have been abandoned to prejudice and to avarice. It would have been enough to have forbidden these societies to admit new members. In that case, they would have died away gradually. Individuals would have suffered no privation. The revenues as they fell in, might have been appropriated to some useful object; and philosophy would have applauded an operation excellent in principle, and mild in its execution. But this slow process is not that which cupidity loves. It would seem as if sovereigns, in dissolving these societies, had wished to punish the members for some wrong they had done. In place of regarding them as orphans and invalids, deserving all the compassion of the legislator, they were looked upon as enemies, who were treated with clemency, even when they were stripped of all their wealth and reduced to absolute want.

6. *Suppression of pensions and places, without indemnity to the possessors.* This attack upon security merits the rather a particular mention, because instead of being blamed as an injustice, it is often approved as an act of economy and reform. Envy is never so much at its ease, as when it can conceal itself under the mask of patriotism and the public good. But the public good requires only the abolition of sinecures; it does not demand the ruin of the persons who hold them.

The principle of security requires, that reform should be

attended with complete indemnity. The only benefit that can be lawfully drawn from it, is, the conversion of a perpetual into a life annuity.

Is it said that the immediate suppression of these places will be a gain to the public? This argument is sophistical. The sum in question would doubtless be a gain, considered in itself, if it came from abroad, or if it were acquired by commerce; but it is not a gain when taken from the hands of certain individuals, who are themselves a part of the public. Would a family be the richer because the father had taken every thing from one of his children, the better to endow the others? Even in such a case, the spoils of one child would increase the inheritance of his brothers, and the evil would not be a total loss; it would produce a portion of good. But when the question is of the public, the profit of a place suppressed is divided among the whole community, while the loss falls entirely upon one. The gain, spread among the multitude, is divided into impalpable parts; the loss is wholly felt by him who alone supports it. The result of the operation is this,—it does not enrich the party that gains, and it reduces him who loses, to poverty. Instead of one place suppressed, suppose a thousand, ten thousand, a hundred thousand. The total disadvantage will remain the same. The plunder taken from thousands of individuals must be divided among millions. Your streets will everywhere present unfortunate citizens whom you will have plunged into indigence; and you will hardly see an individual who will be sensibly the richer, by virtue of these cruel operations. Groans of pain and cries of despair, will resound on every side. The cries of joy, if there are any, will not be expressions of happiness, but of that antipathy which rejoices in the misery of its victims. Ministers of kings and of the people, it is not by the wretchedness of individuals that you will produce the happi-

ness of nations! The altar of the public good demands barbarous sacrifices as little as the altar of the Divinity.

I cannot yet quit the subject; for the establishment of the principle of security demands, that error should be pursued into all its retreats.

What means do men take to deceive themselves, or to deceive the people, on the subject of such great injustice? They have recourse to certain pompous maxims, which are a mixture of truth and falsehood, and which give to a question simple in itself, an air of depth and political mystery. The interest of individuals, it is said, ought to yield to the public interest. But what does that mean? Is not one individual as much a part of the public as another? This public interest, which you introduce as a person, is only an abstract term; it represents nothing but the mass of individual interests. It is necessary to take them all into account, instead of considering some as all, and the others as nothing. If it is a good thing to sacrifice the fortune of one individual to augment that of others, it will be yet better to sacrifice a second, a third, a hundred, a thousand, an unlimited number; for whatever may be the number of those you have sacrificed, you will always have the same reason to add one more. In one word, the interest of everybody is sacred, or the interest of nobody.

Individual interests are the only real interests. Take care of the individuals; never molest them; never suffer any one to molest them; and you will have done enough for the public. Would it be believed that there are men so absurd as to love posterity better than the present generation; to prefer the man who is not, to the man who is; to torment the living, under pretext of doing good to those who are not born, and who perhaps never will be?

Upon a multitude of occasions, men who have suffered by the operation of a law, have not dared to complain, or have not been listened to, by reason of this false and

obscure notion, that private interest ought to yield to public interest. But if it comes to a question of generosity, who is loudest called upon to exercise it,—the whole towards one, or one towards the whole? An evil felt, and a benefit not felt; such is the result of these admirable operations, by which individuals are sacrificed to the public!

I shall conclude by a general observation of great importance. The more the principle of property is respected, the stronger hold it takes on the popular mind. Slight attacks upon this principle, prepare the way for heavier ones. A long time has been necessary to carry property to the point where we now see it, in civilized societies; but a fatal experience has shown with what facility it can be shaken, and how easily the savage instinct of plunder gets the better of the laws. Governments and the people are, in this respect, like tamed lions; let them but taste a drop of blood, and their native ferocity revives.

*Si torrida parvus*

*Venit in ora cruor, rediunt rabiesque furorque ;*

*Admonitaque tument gustato sanguine fauces.*

*Fervet, et a trepido vix abstinet ora magistro.*

LUCAN, iv.

If but a little blood

Touch his hot mouth, fury and rage return;

His counselled jaws swell with the tasted gore;

He raves; and from his trembling keeper scarce

Restrains his teeth.

## CHAPTER XVI.

### *Forced Exchanges.*

“ASTYAGES in Xenophon's *Cyropædia*, asks Cyrus to give an account of his last lesson. Cyrus answers thus: One



of the boys in our school who had a coat too small for him, gave it to one of his companions a little smaller than himself, and took away his coat which was too large. The preceptor made me the judge of this dispute, and I decided that the matter should be left as it was, since both parties seemed to be better accommodated than before. Upon which the preceptor pointed out to me that I had done wrong, for I had been satisfied with considering the convenience of the thing, whereas I ought first to have looked at the justice of it; and justice never would allow violence to be done to any one's property." *Montaigne's Essays*, book i. ch. xxiv.

What ought we to think of this decision? At the first view, it would appear that a forced exchange is not contrary to security, provided an equal value is given. How can I be said to lose in consequence of a law, if after it has had its full effect, the amount of my property remains the same as before? If one has gained, and the other has not lost, the operation seems to be a good one.

No; it is not. He whom you suppose to have lost nothing by a forced exchange, in reality has lost; since every thing movable or immovable has different values for different persons, according to circumstances, and every one expects to enjoy the favorable circumstances which may augment the value of such or such a part of his property. If the house that Peter occupies would be more valuable to Paul, that is no reason why Paul should be gratified, by forcing Peter to yield the house to him, for the sum which it is worth to himself. That would be to deprive Peter of the benefit which he has a right to derive from the very circumstance, that the house is worth more to Paul.

And suppose Paul should say, that for the sake of peace, he had offered a price above the ordinary value, and that Peter refuses it out of pure obstinacy; still it might be replied to him,—this surplus of price which you pretend to

have offered, is only a supposition of yours. The opposite supposition is just as probable. For if you had really offered more than the house is worth, he would have hastened to seize so favorable a circumstance, which might not occur again, and the bargain would have been soon concluded. If he did not accept your offer, it is a proof that you were deceived in your estimate; and that if the house were taken from him on the conditions you propose, it would be an injury to his fortune; if not to what he possesses, at least to what he has a right to acquire.

No,—Paul will reply; he knows that my estimate is higher than any thing he can expect in the ordinary course of things; but he also knows my necessity; and he refuses a reasonable offer, in hopes to derive an unfair advantage from my situation.

I perceive a principle which may serve to settle this difference between Paul and Peter. Things must be distinguished into two classes: those which ordinarily have only their intrinsic value, and those which are susceptible of a value of affection. Houses of the common sort, fields cultivated in the usual way, a crop of hay or corn, and ordinary kinds of manufactures, seem to belong to the first class. To the second, may be referred, pleasure-grounds and gardens, libraries, pictures, statues, collections of natural history. A forced exchange of such objects should never be permitted. The value they derive from a sentiment of affection cannot be appreciated. But objects of the first class may be submitted to forced exchanges, whenever it is the only means to prevent great losses. I possess a piece of land from which I derive a considerable revenue, but which I can approach only by a road running along the edge of a river. The river overflows and washes away the road. My neighbor obstinately refuses me a passage along a strip of land which is not worth the hundredth part of my

field. Ought I to lose my all, through the caprice or hostility of an unreasonable neighbor?

But to prevent the abuse of a principle so delicate, rigorous rules ought to be laid down. I say then, that forced exchanges ought to be permitted to prevent a great loss; as in the case of a field rendered inaccessible except by a passage through another.

By observing all the scruples of the English legislators in this behalf, we may perceive the respect which is paid in that country to the rights of property. If a new road is to be opened, an act of parliament must be first obtained. All interested are heard; and the legislature, not content with assigning an equitable satisfaction to the proprietors, protects houses, gardens, and such other objects as may have a value of affection, by special exceptions in the act.

Forced exchanges may also be justified whenever the obstinacy of an individual or of a small number, are clearly hostile to the advantage of a greater number. So in the matter of the English Inclosure Acts, the opposition of a few has not been suffered to prevail; and the sale of houses is often compelled by the law, where the convenience or the health of cities requires it.

The question is of forced *exchanges*, not of forced transfers. For a transfer is not an exchange; and a forced transfer without equivalent, even for the benefit of the state, would be a mere injustice—an act of power devoid of that tenderness which the principle of utility ever demands.

## CHAPTER XVII.

*Power of the Laws over Expectation.*

THE legislator is not master of the dispositions of the human heart; he is only their interpreter and their minister. The goodness of the laws depends upon their conformity to general *expectation*. The legislator ought to be well acquainted with the progress of this expectation, in order to act in concert with it. This should be the end; let us inquire into the conditions necessary to attain it.

1. The first of these conditions, but at the same time the most difficult to fulfil, is this: *that the laws should be anterior to expectation*. If we could suppose a new people, a generation of children, the legislator, finding no expectations already formed in contradiction to his views, might fashion them at his pleasure, as the statuary does a block of marble. But as there exists already among all people, a multitude of expectations founded upon ancient laws or ancient usages, the legislator is forced to follow a system of conciliation and of humoring, which constantly fetters him.

The very first laws found some expectations already formed. For we have seen that prior to laws, there existed a feeble kind of property, that is, a sort of expectation of preserving what had been acquired. The laws received their first determination from these anterior expectations; they have produced new ones; and have gradually formed the channel of our desires and hopes. No changes can be made in the laws of property, without deranging, more or less, this established current; and without opposing more or less resistance to it.

Do you find it necessary to establish a law contrary to the actual expectations of men? If it is possible, you should so arrange matters that this law will not begin to take effect,

except at a remote period. The present generation will not feel the change; and the rising generation will be prepared for it. You will find among the young, auxiliaries against old opinions; you will not wound actual interests, because time will be allowed to prepare for a new order of things. Everything will become easy to you, because you will have prevented the birth of those expectations, which otherwise you would have been compelled to contradict.

2. The second condition is, *that the laws should be known*. A law which is unknown can have no effect upon expectation; it will not even serve to prevent a contrary expectation.

This condition, it will be said, does not depend upon the nature of the law, but on the measures which are taken to make it public. These measures may be sufficient for their object, whether the law be so or not.

This reasoning is more specious than true. There are some laws so made, as to be more easily known than others. These are laws conformable to expectations already formed; laws which rest upon *natural expectations*. This natural expectation, that is, this expectation produced by previous habits, may be founded upon a superstition, upon a hurtful prejudice, or upon a perception of utility, it makes no difference which; the law which is conformed to it is easily borne in mind; in fact, it was in the mind, before it received the sanction of the legislator. But a law contrary to this natural expectation, is difficult to be understood, and still more difficult to be remembered. Another arrangement always suggests itself, while the law, strange to all, and without any root in the mind, tends constantly to slip from a place to which it has only an artificial adhesion.

Codes of ritual law have this inconvenience among others, that the fantastic and arbitrary rules of which they are composed, never well known, fatigue the understanding and the memory; so that man, always fearful, always in fault,

always defiled by some imaginary sin, can never count upon innocence, and lives in perpetual need of absolution.

Expectation naturally directs itself towards the laws which are most important to society. The stranger who commits a theft, a forgery, an assassination, should not be suffered to plead ignorance of the laws of the country, since he could not be ignorant that acts so manifestly hurtful, were crimes everywhere.

3. The third condition is, *that the laws should be consistent*. This principle is closely connected with the preceding, but it serves to place a great truth in a new light. When the laws have established a certain arrangement upon a principle generally admitted, every additional arrangement which is consistent with that principle, will prove to be conformable to the general expectation. Every analogous law is presumed, as it were, beforehand. Each new application of the principle, contributes to strengthen it. But a law which has not this character, remains isolated in the mind; and the influence of the principle to which it is opposed, is a force which tends without ceasing, to drive it from the memory.

That upon a man's death his property should go to the next of kin, is a rule generally admitted, and according to which expectations are naturally formed. A law directing the order of succession, which should conform to this principle, would obtain a general approbation, and would be universally understood. But the more this principle is obscured, by admitting exceptions, the more difficult it is to understand the law and to remember it. The English *Common Law* affords us a striking example. It is so complicated in its provisions regulating the descent of property; it admits distinctions so singular; the decisions which serve to regulate it are so subtle; that not only is it impossible for simple good sense to presume its regulations beforehand,

but it is very difficult to discover them at all. It is a profound study, like that of the most abstract sciences, confined to a small number of privileged men. It has been even necessary to subdivide it; for no lawyer pretends to understand the whole of it. Such has been the fruit of too superstitious a respect for antiquity!

When new laws are made in opposition to a principle established by the old ones, the stronger that principle is, the more odious will the inconsistency appear. A contradiction of sentiment results from it; and disappointed expectations accuse the legislator of tyranny.

In Turkey, when an officer of the government dies, the Sultan takes possession of his entire fortune; and his children fall at once from the height of opulence to the depths of poverty. This law, which overturns all natural expectations, was perhaps borrowed from some other oriental government, in which it was less inconsistent and less odious, because the sovereign entrusted employments only to eunuchs.

4. The fourth condition is, that *the laws should be consistent with the principle of utility*; for utility is a point toward which all expectations have a natural tendency.

It is true that a law conformable to utility may happen to be contrary to public opinion; but this is only an accidental and transitory circumstance. All minds will be reconciled to the law so soon as its utility is made obvious. As soon as the veil which conceals it, is raised, expectation will be satisfied, and public opinion be gained over. Now it is plain, that the more the laws are conformed to utility, the more manifest it is possible for their utility to become. If we ascribe to a thing a quality which it does not possess, the triumph of error can exist but for a time; a single ray of light will suffice to dissipate it. But a quality which actually exists, although not known, may chance to be discovered at any instant. At the first moment, an innovation

is surrounded by an impure atmosphere; a mass of clouds formed by caprices and prejudices float about it; and the appearance of things is changed by the refractions it undergoes in the passage through so deceitful a medium. It needs time for the sight to grow strong, and to acquire the power of separating from the object, all that is foreign to it. But little by little, truth gains the ascendant. If the first attempt does not succeed, the second will be more fortunate; because it will be better known where lies the difficulty which it is necessary to conquer. The plan which favors the most interests, cannot fail in the end to gain the most suffrages; and the useful novelty which at first was repulsed with affright, becomes presently so familiar, that no one recollects its commencement.

5. The fifth condition is, *method in the laws*. The bad arrangement of a code of laws, may produce by its effect upon expectation, the same inconveniences with incoherence and inconsistency. There may result from it the same difficulty of understanding the law, and of remembering it. Every man has his limited measure of understanding. The more complex the law is, the more it is above the faculties of a great number. In the same proportion it is less known; it has less hold upon men; it does not present itself to their minds upon the necessary occasions; or what is yet worse, it deceives them, and produces false expectations. Both the style and the method should be simple; the law ought to be a manual of instruction for each individual; and every one should be enabled to consult it in doubtful cases, without the aid of an interpreter.

The more the laws conform to the principle of utility, the simpler they will become; for a system founded upon a single principle, may be as simple in form as in substance. It is only such a system which is susceptible of a natural method, and a familiar nomenclature.

6. To become the controller of expectation, the law ought



to present itself to the mind as *certain to be executed*; at least, no reason for presuming the contrary ought to appear.

Is there ground for supposing that the law will not be executed? An expectation is formed contrary to the law itself. The law then is useless. It never exercises its power except to punish; and these inefficacious punishments are an additional reproach to the law. Contemptible in its weakness, odious in its force, it is always bad, whether it reaches the guilty, or suffers him to escape.

This principle has often been absurdly disregarded. For example, during Law's paper-money system, when the citizens of France were forbidden to keep in their houses more than a certain sum in coin,—could not everybody presume on the success of disobedience?

How many mercantile prohibitions are vicious in this particular! A multitude of rules easily eluded, form, so to speak, a lottery of immorality, in which individuals stake their money against the legislator and the custom-house.

It is in accordance with this principle, that the domestic authority has been established in the hands of the husband. If it had been given to the woman, the physical power being on one side, and the legal power on the other, the discord would have been eternal. If an equality had been established between them, this nominal equality could never have been maintained, because of two opposite wills, one or the other must have the sway. The existing arrangement is most favorable to the peace of families, because in making the physical and legal power operate in concert, every thing is combined which is necessary for effectual action.

This principle affords a great assistance towards the resolution of certain problems, which have very much embarrassed the lawyers; such, for instance, as this—in what cases ought a *thing found*, to belong to the finder? The easier it would be to appropriate the thing in spite of the law, the more

expedient is it not to make a law which will disappoint expectation; or in other terms, the easier it is to elude the law, the more cruel it would be to make a law, which presenting itself to the mind as almost impossible to be executed, would do nothing but evil, when by chance it should happen to be executed. This may be made clearer by an example. Should I find a diamond in the ground, my first idea would be, to regard it as my own; and an expectation of keeping it would be formed at the same instant, not only through the bent of desire, but also by analogy with habitual ideas of property. 1st. I have the physical possession of it, and this possession alone is a title, where there is no opposing title. 2d. There is something of mine in the discovery; it is I who have drawn this diamond from the dirt, where, unknown to all the world, it had no value. 3d. I may flatter myself with the idea of keeping it, without the aid of the law, and even in spite of the law; since it will be enough to conceal it, till I have a pretext for producing it under some other title. Now, should the law undertake to bestow the diamond upon some other person than me, it could not prevent this first movement of expectation, this hope of keeping it; and in taking it away from me, it would make me experience that pain of disappointment, commonly called *injustice* or *tyranny*. This reason would be sufficient for causing the thing to be given to the finder, unless some stronger reason can be offered to the contrary.

This rule may vary according to the natural chance of keeping the thing found, without the aid of the law. A shipwrecked vessel which I may have been the first to see upon the coast; a mine; an island, which I may have discovered; are objects as to which an anterior law may prevent any idea of property, because it is impossible for me secretly to appropriate them to my own use. The law which refused them to me, being easily executed, would have its full and entire effect upon my mind; to such a degree, that if the

question turned on this principle alone, the legislator would be at liberty to give or refuse the thing to the discoverer, as he saw fit. But there is a particular reason for showing some favor to the discoverer, which is; that a reward given to industry tends to augment the general wealth. When all the profit of discovery passes to the public treasury, that all, is generally very little.

7. The seventh and last condition, necessary to produce a conformity between expectation and the laws, requires that the *laws should be literally followed*. This condition depends partly on the laws, and partly on the judges. If the laws do not harmonize with the ideas of the people, if the code of a barbarous age still prevails in an era of civilization; the tribunals, little by little, will drop old principles, and insensibly substitute new maxims. Thence will result a kind of contest between laws that are growing obsolete, and usage that is taking their place; and a feebleness in the effect of the laws upon expectation, will be a consequence of this uncertainty.

The word *interpretation*, has a very different meaning in the mouth of a lawyer, from what it has when employed by other people. To interpret a passage in an author, is to bring out of it the sense which the writer had in his mind; to interpret a law in the sense at least of the Roman lawyers, is often to get rid of the intention clearly and plainly expressed, and to substitute some other for it, in the presumption that this new sense was the actual intention of the legislator!

With such a method of proceeding, there is no security. Where the law is fixed, though it be difficult, obscure, incoherent,—the citizen always has a chance to know it. It gives a confused intimation, less efficacious than it might be, yet always useful; we see at least the limits of the evil it can do. But let a judge dare to arrogate to himself the power of interpreting the laws, that is to say, of substituting

his will for that of the legislator, and every thing becomes arbitrary; no one can foresee the course which caprice will take. The question is no longer of the actual evil; however great that may be, it is small, in comparison with the magnitude of possible consequences. The serpent, it is said, can pass his whole body wherever he can introduce his head. As respects legal tyranny, it is this subtle head of which we must take care, lest presently we see it followed by all the tortuous folds of abuse. It is not the evil only which we ought to distrust,—it is the good even which springs from such means. Every usurpation of a power above the law, though useful in its immediate effects, as regards the future ought to be an object of terror. There are bounds, and even narrow bounds, to the good which can result from such arbitrary proceedings; there are no bounds to the possible evil; there are no bounds to the alarm. An indistinct danger hovers over every head.

Without speaking of ignorance and caprice, how many facilities does this arbitrary system afford to partiality! The judge, now conforming to the law, and now explaining it away, can always decide a case to suit his own designs. He is always sure of saving himself, either by the literal sense, or the interpretation. He is a charlatan who astonishes the spectators, by making sweet and bitter run from the same cup.

One of the most eminent characteristics of the English tribunal, is their scrupulous fidelity in following the declared will of the legislator; and in directing themselves as much as possible, by former judgments, in that imperfect part of English legislation which depends upon custom. This rigid observation of the laws may have considerable inconveniences in an incomplete system, but it is the true spirit of liberty which inspires the English with so much horror for what they call *ex post facto laws*.

All the conditions which constitute the goodness of the

laws have so intimate a connection, that the fulfilment of one, supposes the fulfilment of the others. Intrinsic utility; apparent utility; consistency; simplicity; facility of being known; probability of execution; all these qualities may be reciprocally considered as the cause or the effect of each other.

If that obscure system, called *custom*, were no longer permitted, and every thing were reduced to written law; if the laws which concern every member of the community were arranged in one volume, and those which concern particular classes in little separate collections; if the general code were universally disseminated; had it become, as among the Hebrews, a part of worship, and a manual of education; if a knowledge of it were required as preliminary to the enjoyment of political rights;—the law would then be truly known; every deviation from it would be manifest; every citizen would become its guardian; its violation would not be a mystery, its explanation would not be a monopoly; and fraud and chicane would no longer be able to elude it.

It is further necessary that the style of the laws should be as simple as their provisions; that it should make use of common language; that its forms should have no artificial complexity. If the style of the code differed from that of other books, it should be by a greater clearness, by a greater precision, by a greater familiarity, because it is designed for all understandings, and particularly for the least enlightened class.

After having imagined such a system of laws, if we proceed to compare it with what actually exists, the sentiment that results is far from favorable to our institutions. But however bad existing laws may be, let us distrust the declamations of chagrin, and the exaggerations of complaint. He who is so limited in his views, or so passionate in his ideas of reform, as to desire a revolt, or to bring the established system into general contempt, is unworthy to be heard

at the tribunal of an enlightened public. Who can enumerate the benefits of law, I do not say, under the best government, but under the worst? Are we not indebted to it for all we have of security, property, industry, and abundance? Are we not indebted to it for peace between citizens, for the sanctity of marriage, and the sweet perpetuity of families? The good which the law produces is universal; it is enjoyed every day and every moment. Its evils are transient accidents. But the good is not perceived; we enjoy it, without referring it to its true cause, as if it appertained to the ordinary course of nature; while evils are vividly felt, and in the description of them, the suffering which is spread over a great space, and a long series of years, is accumulated by the imagination upon a single moment. How many reasons we have to love the laws in spite of their imperfections!

## PART SECOND.

### DISTRIBUTION OF PROPERTY.

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#### CHAPTER I.

##### *Titles which constitute Property.*

WE have already shown the reasons which induce the legislator to sanction property. But hitherto we have viewed wealth only in the mass; it is now necessary to descend to details, to take the individual objects which compose it, and to seek the principles which ought to govern the distribution of property, at the time when it presents itself to the law, to be appropriated to such or such individuals. These principles are the same which we have already laid down, viz. *Subsistence, Abundance, Equality, Security*. Where they agree, the decision is easy; when they differ, we must learn to distinguish where the preference should be given.

I. ACTUAL POSSESSION. Actual possession is a title to property which precedes all others, and may hold the place of them. It will always be good against every man who has no other to oppose to it. Arbitrarily to take away from him who has, for the sake of giving to him who has not, is to create a loss on one side, and a gain on the other. But first, the value of the resulting pleasure will not be equal to

the amount of the resulting pain; second, such an act of violence, by its attack upon security, will spread alarm among all proprietors. It appears then, that actual possession is a title founded upon good of the first order, and good of the second order.

What is called the right of the *first occupant*, or of original discovery, amounts to the same thing. When the right of property is awarded to the first occupant,—1st. He is spared the pain of disappointment, the pain he would have felt at seeing himself deprived of a thing of which he had been the first to take possession. 2d. The contests are prevented which might take place between the first occupant and a succession of competitors for the possession. 3d. Certain enjoyments are produced, which otherwise would have had no existence; for the first occupant, if he had no right of possession, dreading to lose what he had found, would not dare to enjoy it openly, for fear of betraying himself; and whatever he could not instantly consume, would be valueless to him. 4th. The enjoyment thus bestowed upon a discoverer, is a spur to the industry of others, who will be encouraged to seek like enjoyments for themselves; and these individual acquisitions will result in general wealth. 5th. If unappropriated things did not belong to the first occupant, they would always be the prey of the strongest, and the weak would be forever oppressed.

All these reasons do not present themselves distinctly to men's minds; but they are perceived in a confused manner, as it were instinctively. Such, they say, is the decree of reason, equity and justice. These words, which everybody repeats and nobody explains, express nothing but a sentiment of approbation; but this approbation, founded upon solid reasons, acquires a new force when distinctly supported upon the principle of utility.

The title of original occupation formed the primitive foundation of property. It will still serve as regards islands



newly risen from the waters, or lands newly discovered, saving the right of government, which is a peculiar incident of sovereignty.

II. ANCIENT POSSESSION IN GOOD FAITH. Possession, after a certain period fixed by the law, ought to prevail over all other titles. If you have suffered that period to elapse without putting in a claim, it is a proof, either that you were ignorant of the existence of your right, or that you had no intention to avail yourself of it. In these two cases there is no expectation on your part, no desire to gain possession; and on my part, there is an expectation and a desire to preserve it. To leave the possession with me, will not be contrary to security; but it will be an attack upon security to transfer the possession to you; for it will give inquietude to all possessors who are obliged to rely for their title upon ancient possession in good faith.

But what length of time is necessary to produce this displacement of expectation? or in other words, what period is necessary to legitimate property in the hands of a possessor, and to extinguish every opposite title? To this inquiry, no exact answer can be given. It is necessary to draw at hazard the line of demarcation, according to the kind and value of the property in question. If this line does not always prevent the pain of disappointment among those actually interested, it will at least prevent all evil of the second order. The law informs me that if during one year, ten years, or twenty years, I neglect to claim my right, the loss of that right will be the result of my negligence. This threat, the effects of which I can prevent, is not calculated to disturb my security.

I suppose that the possession is in good faith, that is, that the possessor believes himself to have a title. If not so, to confirm it, would not be to favor security, but to reward crime. The age of Nestor ought not to be sufficient to ensure to the fraudulent usurper, the wages and the pay

of his iniquity. Why should there be a time when the malefactor can become tranquil? Why should he enjoy the fruits of his offence under the protection of the laws he has violated?

With respect to heirs, a distinction must be taken. Are they possessors in good faith, believing themselves to have a title? The same reasons can then be alleged in their behalf, as in behalf of the former proprietor; and they have the possession beside, which inclines the balance in their favor. Are they possessors in bad faith, as their ancestor was? Then they are his accomplices; and impunity ought never to become the privilege of fraud.

This second title is what is commonly called *Prescription*. The *reasons* on which it is founded, are, the prevention of disappointment, and the general security of proprietors.

III. POSSESSION OF THE CONTENTS AND PRODUCE OF LAND. The property of a field includes every thing which the field contains, and every thing which it produces. We understand by *contents*, every thing beneath the surface, such as mines and quarries; by *produce*, every thing that belongs to the vegetable kingdom. All possible reasons,—security, subsistence, the augmentation of general wealth, the good of peace, combine to give this extent to the right of property in land.

IV. POSSESSION OF WHAT LAND SUPPORTS, AND OF WHAT IT RECEIVES. If my land has supported animals, it is to me that they owe their sustenance. Their existence would be a loss to me, if the possession of the animals themselves did not secure me an indemnity. If the law gave them to another, it would be a pure loss on my part, and a pure gain on his; an arrangement as contrary to equality as to security. It would then become my interest to diminish their number, and to prevent their multiplication, which would be manifestly to the detriment of the general wealth.

If chance has thrown upon land, things which have not

yet received the stamp of property, or which have lost the impress of it, as a whale driven on shore by a storm, the scattered fragments of a wreck, or trees torn up by the roots, such things ought to belong to the owner of the land. The reason of this preference is, that he is so situated as to derive a profit from them, without any individual being subjected to a loss; they cannot be taken from him without occasioning a pain of disappointment; and finally, no other person can take them, without occupying his land, and trespassing upon his rights. He has all the reasons of a first occupant in his favor.

V. POSSESSION OF ADJACENT LANDS. If water which has covered unappropriated land, leaves it, to whom shall the new land belong? There are many reasons for giving it to the proprietors of the adjacent lands. 1st. They only can occupy it without trespassing upon the property of others. 2d. They only have formed some expectation of possessing it, or can look upon themselves as having a claim to it. 3d. The chance of gaining by the retreat of the waters, is no more than an indemnity for the chance of losing by their invasion. 4th. The property in land gained from the water, will operate as a reward, calculated to stimulate the labor necessary to this kind of conquest.\*

VI. AMELIORATIONS OF ONE'S OWN PROPERTY. If I have applied my labor to one of those things which already belong

\* Such is the theory. In practice, many details will be required, otherwise this concession will resemble that famous partition of the new world, which a pope made between the Spanish and Portuguese. Suppose the water quits a bay, which has many proprietors on its shores; shall the distribution be regulated according to the quantity of land which each possesses, or to the extent of his shore? Lines of demarcation will be necessary; but it will not answer to wait till the event has arrived, and the value of the land is known, for then all will entertain hopes, which some only can realize. The event must be anticipated, and expectation not yet formed will then be docile in the hands of the legislator.

to me, my title acquires a new force. I have sowed and gathered these vegetables, the produce of my land; I have taken care of these animals; I have dug these roots; I have cut these trees and shaped them. If I should have suffered at seeing these things taken from me before I had bestowed any pains upon them, how much more shall I suffer after the efforts of my industry have given them a new value, and have fortified my attachment to them, and my expectation of keeping them? This fund for future enjoyment, which labor constantly increases, could not exist without security.

VII. POSSESSION IN GOOD FAITH, WITH AMELIORATION OF ANOTHER'S PROPERTY. But if I have applied my labor to a thing belonging to another, treating it as if it belonged to me; for example, if I have made cloth of your wool,—to which of us shall the manufacture belong? Before answering, it is necessary to ascertain the state of the facts. Is it in good faith or bad faith, that I have treated the thing as my property? If I have acted in bad faith, to give me the production, would be to reward crime; if I have acted in good faith, it remains to inquire which of the two values is the greater, the original value of the thing worked upon, or the additional value of the labor bestowed upon it? How long since the first owner lost it? How long have I possessed it? To whom belongs the place in which it is, at the moment when it is reclaimed,—to me, to the former possessor, or to a stranger?

The principle of caprice, without regard to the comparative amount of pains and pleasures, gives every thing to one of the parties, without paying any attention to the other. The principle of utility, anxious to reduce to the least term, an inevitable inconvenience, weighs the two interests, seeks the means of reconciling them, and directs indemnities. It grants the thing itself to that claimant who would suffer the greater loss if his demand were refused, upon the

condition, however, of giving to the other a sufficient indemnification.

It is according to these same principles, that we must answer the same question in relation to things which become mixed and confounded, as metal of yours and mine, which has run together in the melting-pot, or liquors of mine which have been poured into the same recipient with yours. There are great debates among the Roman jurists, who shall have the whole; the *Sabinians* wish to give the whole to me; the *Proculeians* wish to give the whole to you. Which is right? Neither. Either decision would still leave one of the parties a sufferer. A single question might cut short all these debates—Which of the two, in losing what belonged to him, would lose the most? Let him have the possession, and let the other have an indemnity.

The English lawyers have cut this gordian knot. They have not troubled themselves to examine on which side would be the greater injury; they make no account of good faith, or of bad faith; they make no inquiry as to the greater value, or the stronger expectation. They decide that the property of movable effects shall always be given to the actual possessor, on condition however of indemnifying the other claimant.

#### VIII. EXPLORATION OF MINES IN THE LAND OF ANOTHER.

Your land has hidden treasures in its bosom; but because you lack the knowledge, or the means, or have little confidence of success, you do not dare to undertake the enterprise of mining, and the treasures remain buried. If I, a stranger to your land, have all the means of exploration which you want, and I wish to undertake it, ought the right to be granted to me without your consent? Why not? Under your hands, these buried riches are of no use to any body; in mine, they will acquire a great value; thrown into circulation, they will animate industry. What wrong

is done to you? You lose nothing. The surface, the only thing which you put to any use, may still remain in the same condition. But the law, attentive to the interests of all, ought to secure you a share, greater or less, of the produce; for though this treasure might be of no actual value in your hands, still you would have an expectation of sometime profiting by it, and you ought not to be deprived of that chance without indemnity.

Such is the English law. Under certain conditions, it allows a vein, discovered in one field, to be followed into another, by any one who is willing to undertake the enterprise.

**IX. LIBERTY OF FISHING IN GREAT WATERS.** Great lakes, great rivers, great bays, and especially the ocean, are not occupied by exclusive proprietors. They are considered as belonging to nobody, or rather, as belonging to all.

There are no reasons for limiting the ocean fisheries. The multiplication of most kinds of fish appears to be inexhaustible. In this matter, the prodigality, the magnificence of nature, almost surpasses conception. The indefatigable Lewvenhoek has estimated, that the spawn of a single cod is capable of producing six millions of codlings. What we can take or consume out of this immense magazine of food, is absolutely nothing when compared with the destruction produced by physical causes, which we can neither lessen nor prevent. Man on the ocean, with his wherry and his nets, is but a feeble rival of the great rulers of the sea. Sharks cause more ravages among the small fish, than he does. As to the fish of rivers, lakes, and small bays, the laws take precautions for their preservation, at once necessary and efficacious.

Where there is no occasion for jealousy, and no fear that the number of competitors will diminish the fund of wealth, it is better to leave to every one the right of first occupancy,

and to encourage every kind of labor that tends to augment the general abundance.

**X. LIBERTY OF HUNTING UPON UNAPPROPRIATED GROUNDS.** It is the same with unappropriated lands, uncultivated wastes and savage forests. In those vast countries, which are not peopled in proportion to their extent, these unappropriated tracts are often of great size, and the right of hunting may be exercised without limit. Man there is only a rival of the beasts of prey; and the chase enlarges the fund of subsistence without injuring any body

But in civilized societies, where agriculture has made great progress, and where unappropriated lands bear only a small proportion to those which have received the impress of possession, there are many reasons against allowing this right of chase.

*First inconvenience.* In those countries where the population is numerous, the destruction of wild animals may go on faster than their reproduction. Render the chase free, and the animals which are the object of it, would sensibly diminish, and even be annihilated. The sportsman would presently have as much trouble to obtain a single partridge, as he now has to get an hundred, and the price would be enhanced an hundred fold. He would suffer no loss himself; but he would furnish to society only an hundredth part the value which he now furnishes. In simpler terms, the pleasure of eating partridges would be reduced an hundred fold.

*Second inconvenience.* The chase, without being more productive than other labors, has unhappily more attractions. Sport is combined with labor, idleness with exercise, and glory with danger. The charm of a profession so well adapted to all the natural tastes of man, will draw into this pursuit a great number of competitors; by their competition, they will reduce the profits of this employment to a mere

subsistence; and in general, this class of adventurers will be poor.

*Third inconvenience.* The chase having particular seasons, there will be intervals, during which the huntsman will be unemployed. He will not easily return from a wandering to a sedentary life, from independence to subjection, and from a habit of idleness to a habit of labor. Accustomed, like the gambler, to live upon chances and hope, a small fixed income has few attractions for him. The want and idleness of such a condition naturally lead to crime.

*Fourth inconvenience.* The very exercise of this profession is naturally fertile in offences. The quarrels, the lawsuits, the prosecutions, the convictions, the imprisonments and other punishments which it causes, are more than sufficient to counterbalance its pleasures. The hunter, tired with vainly waiting for his prey on the highways, secretly spies out the game in the neighboring enclosures. Does he think himself observed? He turns aside, and waits,—for he is an adept in patience and stratagem. Does he see no witnesses? He respects boundaries no longer; he jumps the ditches, he leaps the hedges, he devastates enclosures; and his cupidity betraying him into imprudences, he gets himself into perilous positions, whence he cannot escape without disaster, or crime. If hunting were permitted on the high roads, there would be needed an army of guards to restrain the wanderings of the hunters.

*Fifth inconvenience.* If this right of chase, so little advantageous when confined within such narrow limits, is still suffered to exist, the civil and penal code will need an assortment of laws to limit its exercise and to punish its excesses. This multiplication of laws is always an evil, because laws cannot be multiplied without being weakened. Besides, the severity necessary to prevent offences so easy and so attractive, gives an odious character to property, and



places the opulent in a state of war with their poor neighbors. The way to cut this matter short, is, not to regulate the right, but to suppress it.

The prohibitive law being once known, no expectations will be formed of enjoying this privilege. Partridges will no more be coveted than pullets; and even in the minds of the multitude, poaching will not be distinguished from theft.

It is true, that at the present day, popular ideas are in favor of this right of hunting; but if a condescension is due to popular ideas, it is only upon occasions when they have a great power, and when there is little hope of changing them. Let pains be taken to enlighten the people, to make the motives of the law evident, to exhibit it as a means of peace and security, to show that the exercise of this right reduces itself almost to nothing, that the life of a hunter is miserable, that this ungrateful profession constantly exposes him who follows it to the commission of offences, and his family to poverty and shame,—and I dare to affirm that popular ideas, pressed by the continuous and mild force of reason, would presently assume a new direction.\*

There are animals whose value does not compensate the damage they do; such as foxes, wolves, bears, and all beasts

\* We may observe, that of the five inconveniences above enumerated with which the right of free hunting is said to be attended, the *second*, *third*, and *fourth* resolve themselves into this, viz., that in a civilized community, the business of hunting is a private loss and a public inconvenience. This being granted,—and the fact is doubtless so,—if by permitting free hunting, that annihilation of wild game, which is described as the *first* inconvenience, can be brought about, it will be a decided benefit; and when hunting ceases for want of game, of course all the evils which go to make up the inconveniences of its existence, will disappear with it. This is a view of the case which the author seems not to have taken. That a right of free hunting would operate in this way, the example of *Massachusetts* clearly proves, a state in which game and sportsmen are equally rare, and game laws are unknown.—*Translator*.

of prey, the enemies of the animals subject to man. So far from preserving, it is an object to destroy them. One means for this end is, to give all a right to destroy them, and a property in the beast when slain, without regard to the ownership of the land. Every hunter who attacks these hurtful animals ought to be considered as employed by the police. But this exception ought to be admitted only in case of animals capable of much mischief.




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## CHAPTER II.

### *Title by Consent.*

It may happen that possessing a thing by a lawful title, we wish to dispossess ourselves of it, and to abandon its enjoyment to another. Shall such an arrangement be confirmed by the law? Doubtless it shall be. All the reasons which plead in favor of the old proprietor, change sides with the transfer, and then plead in favor of the new one. Besides, the former proprietor must have had some motive for abandoning his property. *Motive* is, *pleasure*, or equivalent; *pleasure of friendship* or of benevolence, if the thing was given for nothing; *pleasure of acquisition*, if it was a means of exchange; *pleasure of security*, if it was given to ward off some evil; *pleasure of reputation*, if the object was to acquire the esteem of others. It seems then that the transfer must increase the enjoyment of the parties interested in it. The acquirer stands in the place of the conferrer as to the old advantages, and the conferrer acquires a new advantage. We may then lay it down as a general maxim, that *every alienation imports advantage*. A good of some sort is always the result of it.

When the question is of an exchange, there are then two alienations, of which each has its separate advantages. The advantage for each of the contracting parties, is, the difference to him between the value of the thing he gives, and that of the thing he acquires. In every transaction of this sort, there are two new masses of enjoyment. In this the good of commerce consists.

In all the arts, there are many things which cannot be produced except by the concurrence of a great number of workmen. In all these cases, the labor of an individual would have no value, either for himself or for others, if it could not be exchanged.

II. CASES IN WHICH EXCHANGES SHOULD BE INVALID. But there are cases in which the law ought not to sanction exchanges, and in which the interests of the parties ought to be regulated, as if the bargain had not taken place; because instead of being advantageous, the exchange would be injurious to one of the parties, or to the public. We may arrange all the causes which invalidate exchanges, under the nine following heads:—

1. Concealment.
2. Fraud.
3. Coercion.
4. Subornation.
5. Erroneous idea of legal obligation.
6. Erroneous idea of value.
7. Incapacity.
8. Probable inconvenience to the public.
9. Want of right on the part of the conferrer.

1. *Concealment.* If the thing acquired proves of less value than the acquirer had expected, he experiences regret, and feels a pain of disappointment. If the value is not equal to what he gave in exchange, instead of gaining, he has lost. It is true that the other party has gained; but the *good of gain* is not equivalent to the *evil of loss*. I

have paid ten guineas for a horse, which would be worth that sum if he were sound, but as his wind is broken, he is worth but two guineas. The seller has gained eight guineas which I have lost; but if the interests of the two parties be weighed together, the trade on the whole, is not productive of pleasure, but the contrary.

But if at the time of the sale this inferiority of value was unknown to the former proprietor, why should the exchange be void? Why oblige him to make a disadvantageous re-exchange? The loss must fall on somebody, and why on him more than another? And even suppose that he knew the circumstance which lessened the value of the thing, was he obliged to communicate it without being asked?

The two following questions arise in every case of invalidity resulting from concealment:—Did the seller know of the existence of the fault? Was it a case in which he ought to have told of it? The solution of these questions demands too many details and researches to find a place here, especially as an answer cannot be given which embraces every case, but divers modifications are necessary, according to the different kinds of things.

2. *Fraud.* This case is simpler than the preceding. A fraudulent acquisition ought never to be permitted, when it can be hindered. Fraud is an offence which borders upon theft. You asked the seller if the horse was broken-winded; he replied in the negative, knowing the contrary. To sanction such a trade would be to reward crime. Add the reason in the preceding case, namely, an evil to the purchaser greater than the good to the seller, and it will then appear that this cause of invalidity is well founded.

3. It is the same with *coercion*. A seller whose horse is worth but two guineas, has constrained you, by violence and threats, to give ten guineas. Suppose you would have been willing to pay two guineas, the surplus is so much

gained by an offence. It is true that this loss was an advantage to you in comparison with the evil you were threatened with in case of refusal; but neither this comparative advantage, nor the gain of the delinquent, can counterbalance the evil of the offence.

4. It is the same with *subornation*; by which I understand the price of a service which consists in committing an offence, as money promised to a man to engage him to give a false deposition. There are two advantages in such a bargain, that of the suborned, and that of the suborner; but these two advantages are not at all equal to the evil of the offence.

It may be observed in passing, that in the case of fraud, of undue coercion, and of subornation, the law, not content with annulling the act, opposes to it a stronger counterweight of punishment.

5. *Erroneous idea of legal obligation.* You have delivered your horse to a man, under an erroneous idea, that your manager had sold him. Or you have delivered your horse to a man under the impression that he was authorized by the government to take him for the use of the state; in one word, you imagine yourself obliged to sell, when no such obligation exists: If after the discovery of the mistake the alienation should be confirmed, the buyer would make an unexpected gain, while the seller would experience an unexpected loss. But we have seen that the *good of gain* is not equivalent to the *evil of loss*. Besides, this case may be classed with that of coercion.

6. *Erroneous idea of value.* If in alienating a thing, I was ignorant of a circumstance which tended to augment its value, upon discovering my error, I shall experience the regret of loss. But is that a reason for invalidating the contract? On the one side, if such causes of nullity are admitted without restriction, there is the risk of a great discouragement to exchanges; for what security of acquisition

do I have, if the seller can break the trade, under the pretence of not knowing what he was about? On the other side, there would be the pain of a very lively regret, if after having sold a diamond as a morsel of crystal, there were no means of recovering it. To hold an equal balance between the parties, we must conform to the diversity of circumstances and of things. We must always examine if the ignorance of the seller were not the result of negligence; and even should the case require the avoidance of the sale, it will always be necessary to provide for the security of the person whose interest it would be to have the bargain confirmed.

But it may be that a trade exempt from all these faults, turns out to be disadvantageous. You bought a horse for the sake of a journey which you do not make. When you are ready to set out, the horse falls sick and dies. You set out, and the horse throws you and breaks your leg. You mount the horse, but only to go on the highway to rob. The fancy which made you buy him was transitory, and being past, leaves you a loser. These eventual cases may be multiplied indefinitely,—cases in which a thing acquired on account of its value, becomes useless, or onerous, or fatal to the acquirer, or to another. Are not these, exceptions to the axiom that every exchange imports an advantage? Are not these, reasonable grounds for invalidating the contract?

No. All these unfavorable events are only matters of accident, posterior to the sale. The common case is, that the thing is worth what it costs. The total advantage of useful exchanges is far more than equivalent to the total disadvantage of such as are unfavorable. The gains of commerce are greater than the losses, since the world is now richer than in the savage state. Alienations in general, ought then to be maintained. But to annul alienations on account of accidental losses, would be to interdict

alienations in general; for nobody would wish to sell, nobody would wish to buy, if the transaction could be annulled at any moment, on account of some subsequent event, impossible to be foreseen or prevented.

7. There are cases in which the legislator foresees the evil of conventions, and prohibits them beforehand. It is thus that in many countries prodigals are *incapacitated* to contract, that is, all contracts with them are declared void. But the danger of such contracts, that is, the disposition which renders the prodigal unfit to manage his own affairs, is always previously made known. Every one has notice, or at least might have, of the incapacity which the guardian hand of justice has imposed.

In all countries, there has been established an incapacity to contract, in the two analogous cases of infancy and madness; I say analogous, for what a child is, for a period which may be sufficiently well determined, though always by a demarcation more or less arbitrary, the madman is, for a time indeterminate, or perpetual. The reasons are the same as in the preceding case. Minors and persons of unsound understanding, are by their condition, either ignorant, rash or prodigal. This is presumed by a general induction, which does not need to be sustained by particular proofs.

It is plain that in these three cases, the incapacity ought to extend only to things of a certain importance. To apply them to little objects of daily consumption would be condemning these three classes to die of famine.

8. The law sometimes invalidates contracts in consideration of some *public inconvenience* likely to result from them.

I have a landed property situated on the boundary of the state. If acquired by the neighboring power, it might become the seat of hostile intrigues, or might favor preparations dangerous to my country. Whether I have, or have not, such an intent, the law ought to provide for the public

interest. It ought to prevent the evil, by refusing beforehand to give a sanction to such sales.\*

The restraints which it has been thought fit to put upon the sale of drugs which operate as poisons, may be referred to this head. It would be the same of a prohibition to sell murderous arms, such as stilettos, so frequently used in Italy in the most common quarrels.

It is to this same motive, well or ill founded, that we ought to refer all prohibitions relative to the introduction or sale of certain species of merchandise.†

In most of these cases the custom is to say, that the *contract is void in itself*. We need but open the law books to see what nonsense has been gravely uttered upon this subject, and to discover into what absurdities the lawyers have fallen, from not having seized upon the sole cause of the invalidity of contracts made under these circumstances, to wit, that they are attended by more evil than good.

Having said that these contracts are *void in themselves*, to be consistent, it seems to follow, that they ought not to have any effect; that they ought to be annihilated; and that no trace of them should be left. However, there are abundance of cases, in which it will be sufficient to modify them, and to correct their inequality by compensations, without altering the substance of the original contract.

No contract is void in itself; none is valid in itself. It is the law, which in either case grants or refuses validity.

\* Most nations, perhaps without thinking of it, have obviated this danger by a general law, which forbids strangers to acquire lands. But that is going too far. The reason of the prohibition does not extend beyond the particular case above mentioned. The stranger who wishes to buy immovable property, gives the country of his choice the most unequivocal proof of his affection, and the surest pledge of good conduct. Even if we look no further than to finance, the state cannot but gain by such purchases.

† Under this head fall the laws prohibiting the traffic in ardent spirits.—*Translator*.



But for granting or refusing it reasons are necessary. Equivocal generation is banished from sound physiology; perhaps some day, it will be banished from jurisprudence. This *void in itself* is precisely an equivocal generation.

III. OBSTACLES TO THE ALIENATION OF LAND. To say that the power of alienation is useful, is also to say, that all arrangements which tend to prevent it, are generally pernicious.

It is with respect to immovables that this inconsistency has chiefly been displayed, whether by entails, or by inalienable foundations, described by English lawyers as grants in mortmain; yet besides the general reasons already given, there are some particular ones in favor of the free alienation of land.

1. He who seeks to get rid of a landed estate, shows sufficiently that it is not for his advantage to keep it. He either cannot, or will not spend any thing for its improvement; indeed it often happens that he cannot help sacrificing its future value, to satisfy a present want. On the contrary, he who seeks to acquire an estate, certainly has no intention of diminishing its value, and he probably means to increase it.

It is true that the same capital which would be employed in the improvement of a landed estate, might otherwise be employed in commerce; but although the advantage of these two employments might be the same to an individual, they would not be the same to the state. That portion of wealth which is applied to agriculture, is more fixed; that which is applied to commerce, is more fugitive. The first is immovable; the second can be transported at the pleasure of the proprietor.

2. By mortgaging an immovable estate, a productive capital may be raised. Thus one portion of the value of a landed estate, may be employed in the improvement of the other portion of it; an enterprise, which perhaps without

that resource, could not be undertaken. To prevent the free alienation of lands, is to diminish the productive capital which might be employed in their improvement nearly to the amount of their salable value ; for a thing cannot be mortgaged unless it can be alienated.

It is true that we speak here only of loans ; and there is no new capital created by a loan. This same capital, in other hands, might receive a destination not less useful ; but it is to be observed, that the more means there are for employing capital, the greater amount of it will come into a country. That which comes from abroad forms a net addition to the domestic supply.

These restraints upon alienation, though condemned by the soundest notions of political economy, are to be found almost everywhere. It is true that they have gradually diminished in proportion as governments have better understood the interests of agriculture and commerce ; but there are still three causes which operate to maintain them.

The first is, the desire of preventing prodigality. But to obviate this evil, it is not necessary to prevent the sale of lands ; it will be sufficient to protect their value, by not leaving it at the disposal of the prodigal.

The second is, family pride, joined to that agreeable illusion, which paints the successive existence of our descendants, as the prolongation of our own. The imagination is not satisfied with the idea of leaving our children the same value ; they must possess the same lands, the same houses, the same natural objects. This continuity of possession appears a continuity of enjoyment, and gives support to a feeling chimerical and absurd.

The third cause is, the love of power, the desire of ruling after death. The preceding motive supposes a posterity, this does not. It is to this cause that we must refer all

foundations, both those which have an object of utility well or ill understood, and those of pure fancy.

If a foundation consists merely in the distribution of benefits, without imposing any conditions, and without exacting any service, it appears sufficiently innocent, and its continuation is not an evil. We must except foundations for distributing alms without distinction and discernment, which serve merely to promote mendicity and idleness. The best of these establishments are those in favor of such poor as were once of a better condition. They are a means of providing for such unfortunates a more liberal support than public charity would allow.

As to foundations, the benefits of which are not granted except on the fulfilment of certain duties, such as convents, colleges and churches, their tendency is useful, indifferent, or injurious, according to the nature of the services exacted.

It is a singularity which merits observation, that in general, these foundations, these particular laws, which the individual establishes by the indulgence of the sovereign, have been treated with more respect than the public laws, which are immediately derived from the sovereign himself. When a legislator has wished to tie up the hands of posterity, such a proceeding has appeared absurd or futile. The obscurest individuals have arrogated that privilege, and no one has dared to attack it!

It would seem that lands left to corporations, convents and churches, must necessarily decline in value. Indifferent towards successors, who are not allied to him by blood, each transient proprietor will be apt to exhaust as much as he can, a possession which he enjoys only for life; and in old age especially, to neglect the necessary repairs. This sometimes happens. We must be just however, to religious communities. They are oftener distinguished for good, than for bad economy. If their situation inflames cupidity and

avarice, it represses pride and prodigality. If there are causes which nourish among them a spirit of selfishness, there are others which combat that sentiment by creating an *esprit du corps*, a warm attachment to the profession to which they belong.

It is scarcely necessary to mention public property, that is, those things the use of which is public, such as roads, churches, markets. To fulfil their end, it is necessary that their duration should be indefinite, with provision, however, for permitting those successive changes which circumstances may require.

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### CHAPTER III.

#### *Title by Succession.*

AFTER the decease of an individual, how ought his goods to be disposed of?

In framing a law of succession, the legislator ought to have three objects in view:—1st. Provision for the subsistence of the rising generation. 2d. Prevention of disappointment. 3d. The equalization of fortunes.

Man is not a solitary being. With a very small number of exceptions, every man has about him a circle of companions, more or less extensive, who are united to him by the ties of kindred or of marriage, by friendship or by services, and who share with him, *in fact*, the enjoyment of those goods which *in law* belong to him exclusively. His fortune is commonly the sole fund of subsistence on which many others depend. To prevent the calamities of which they would be the victims, if death in taking away their friend, took from them at the same time, the supplies which they draw from his fortune, it is necessary to know

who habitually enjoy these supplies, and in what proportions. Now, since these are facts which it would be impossible to establish by direct proofs, without becoming involved in embarrassing procedures and infinite contests, it is necessary to resort to general presumptions, as the only basis upon which a decision can be established. The share which each survivor was accustomed to enjoy in the property of the deceased, may be presumed from the degree of affection which ought to have subsisted between them; and this degree of affection may be presumed from nearness of relationship.

If relationship were the only consideration, the law of succession would be very simple. In the *first* degree of relationship, are all those who are connected with you without any other person intervening, your wife, or husband, your father, your mother, and your children. In the *second* degree, are those whose connection with you demands the intervention of a single person, or the joint intervention of two persons, your grandfathers, your grandmothers, your brothers, your sisters, and your grandchildren. In the *third* degree, are those whose relationship supposes two intermediate generations, your great-grandfathers, your great-grandmothers, your great-grandchildren, your uncles and aunts, nephews and nieces.

But this arrangement, though quite perfect as respects simplicity and regularity, will not answer the political and moral ends to be aimed at by the legislator. It does not correspond to the degree of affection of which if employed, it must be taken as a presumptive proof; and it will not accomplish the principal object, which is, to provide for the wants of the rising generation. Let us leave then this genealogical arrangement, and adopt one founded upon utility. It consists in *always giving to the descending line, however long, a preference over the ascending and composite lines.*

Still, it must happen, that the presumptions of affection or of want, which serve as a foundation to these rules, will often fail in practice; and that in consequence, the rules themselves will not accomplish their end. But the power of making a will, offers, as we shall see, an efficacious remedy for the imperfections of the general law; and that is the principal reason for sanctioning such a power.

These are the general principles;—but how ought they to be applied in detail, when it is necessary to decide between several claimants?

The model of a law will serve instead of a great number of discussions.

ART. I. *No distinction between the sexes; what is said of one, extends to the other. The portion of the one shall be always equal to that of the other.*

Reason—Good of equality. If there were any difference, it ought to be in favor of the feeble, in favor of women, who have more wants, and fewer means of acquisition, or of employing profitably what they possess. But the stronger have had all the preferences. Why? Because the stronger have made the laws.

ART. II. *After the husband's death, the widow shall retain half the common property; unless some different arrangement was made by the marriage contract.*

ART. III. *The other half shall be distributed among the children in equal proportions.*

Reasons.—1st. Equality of affection on the part of the father. 2d. Equality of co-occupation on the part of the children. 3d. Equality of wants. 4th. Equality of all imaginable reasons on one side and the other. Differences of age, of temperament, of talent and of strength, may produce some differences in point of wants; but it is not possible for the law to appreciate them. The father must provide for them by the exercise of his right to make a will.

**ART. IV.** *If a child dies before his father, leaving children, his share shall be divided among his children in equal proportions; and so of all descendants.*

This distribution by stocks is preferred to that by heads, for two reasons. 1st. To prevent disappointment. That the part of the eldest should be diminished by the birth of each younger child, is a natural event to which his expectation will conform itself. But in general, when one of the children begins to exercise his reproductive faculty, that of the father is almost at its end. At that time, the children suppose themselves arrived at the point where the diminution of their respective portions ceases. But if each grandson and granddaughter were to produce the same diminution which each son and daughter had produced, the diminution would have no bounds. There would no longer be any certainty according to which they could arrange their plan of life. 2d. The grandchildren have, as an immediate resource, the property of their deceased father. Their habit of co-occupation, detached from their grandfather, must have been exercised in preference if not exclusively, upon the fund of their father's industry. Add to this, that they have in the property of their mother and her relations, a resource, in which the other descendants of their grandfather have no share.

**ART. V.** *If there are no descendants, the property shall go in common to the father and mother.*

Why to descendants before all others? 1st. *Superiority of affection.* Every other arrangement would be contrary to the inclination of the father. We love those better who depend upon us, than those upon whom we depend. It is sweeter to govern than to obey. 2d. *Superiority of need.* It is certain that our children cannot exist without us, or some one who fills our place. It is probable that our parents may exist without us, as they did exist before us.

Why should the succession pass to the father and mother,

rather than to the brothers and sisters? 1st. The relationship being more immediate, is a presumption of superior affection. 2d. It is a recompense for services rendered, or rather an indemnity for the pains and expense of educating the child. The relationship between me and my brother consists in our common relationship to the same father and mother; and the reason why he is more dear to me than another companion with whom I have passed an equal portion of my life, is, his being dearer to those who have my first affections. It is not certain that I am indebted to him for any thing, but it is certain that I am indebted to them for everything. Thus, whenever the stronger title of my own children does not intervene, I owe compensations to my parents, to which a brother can have no claim.

ART. VI. *If one of the parents is dead, the share of the deceased shall go to his or her descendants, in the same way as it would have gone had there been any, to the descendants of the deceased child.*

In poor families, whose only property is household furniture, it will be better that the whole should go to the individual survivor, whether father or mother, with the condition of providing for the support of the children. The expense of the sale and the dispersion of the property would ruin the survivor, while the parts, too small to serve as capital, would soon be dissipated.

ART. VII. *Failing such descendants, the whole property shall go to the surviving parent.*

ART. VIII. *If both father and mother are dead, the property shall be divided as above, among their descendants.*

ART. IX. *But the part of the half-blood shall be only half as great as the part of the whole-blood.*

Reason—Superiority of affection. Two ties attach me to my brother, but only one to my half-brother.

ART. X. *In defect of relations in these degrees, the property shall go into the public treasury.*



**ART. XI.** *Under condition, however, of distributing the interest in the form of life annuities among all the relations in the ascending line, in equal shares.*

The tenth and eleventh articles may be adopted or not, according to the condition of the public revenue ; but I cannot discover any solid objection against this fiscal resource. It may be said that the collateral relations who will be excluded by this arrangement, may be in want. But this is too casual an accident to found a general rule upon. They have, as a natural resource, the property of their respective parents, and they do not form their expectations, or fix their plan of life upon this basis. On the part even of an uncle, the expectation of inheriting from a nephew can be but feeble, and a positive law will be enough to extinguish it without violence, or to prevent it being formed. The uncle has not the titles of the father and grandfather. It is true that in case of their death, the uncle may have taken their place, and acted as a father to his nephew. This is a circumstance which merits the attention of the legislator. The power of making a will would be a remedy for cases of this sort ; but that means of obviating the inconveniences of the general law would be unavailing, when the nephew died at an age too tender to allow the exercise of that power. If then it were determined to soften this fiscal regulation, the first exception should be in favor of the uncle, whether as regards the principal, or only the interest of the property.

**ART. XII.** *To effect a division among the heirs, the property shall be sold at auction ; reserving to them the right of making such other arrangement as they may think proper.*

This is the only means of preventing a community of goods, an arrangement, the pernicious consequences of which will presently be pointed out. Such of the property as may have a value of affection, will find its true price from the competition of the heirs, and will turn to the common advan-

tage, without producing those disputes which occasion durable animosities in families.

ART. XIII. *Until sale and division be made, the whole property shall be entrusted to the keeping of the oldest male heir of full age; reserving to the court to make other arrangements, through apprehension of bad management specified on the hearing of the case.*

Women in general, are less fit for affairs of money and business, than men. But an individual woman may have a superior aptitude; if pointed out by the general wish of the relations, she ought to have the preference.

ART. XIV. *In defect of a male heir of full age, the property shall be entrusted to the guardian of the oldest male heir, reserving a discretionary power as in the preceding article.*

ART. XV. *The succession which falls to the treasury for want of natural heirs, shall also be sold at auction.*

The government is incapable of managing specific property to advantage. The administration of such property belonging to a government, costs much, brings in little, and is certain to undergo a rapid deterioration. This is a truth which Adam Smith has demonstrated.

This project of a law, appears to be simple, precise, and easy to be comprehended; it gives little room for fraud, chicanery, or diversity of interpretation; and finally, it is analogous to the affections of the human heart, to those habitual inclinations which spring from the social relations; and therefore it is likely to conciliate both the affections of those who judge by sentiment, and the esteem of those who appreciate reasons.

Those who accuse this plan of being too simple, and who declare that at this rate, the law would no longer be a science, may find wherewith to be satisfied, astonished and delighted, in the labyrinth of the English common law of successions.

To give the reader an idea of the English common law on this subject, it would be necessary to begin with a dictionary of new words; and presently, when they should discover the absurdities, the subtilities, the cruelties, the frauds, with which that system abounds, they would imagine that I had written a satire, and that I wished to insult a nation, otherwise so justly renowned for its wisdom.

It is to be observed however, that the right of making a will, reduces this evil within tolerably narrow limits. It is only the succession to the property of intestates which is obliged to pass through the crooked roads of the common law. Wills in that country, may be compared to arbitrary pardons, which correct the severity of penal laws.

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## CHAPTER IV.

### *Testaments.*

1. THE law, not knowing individuals, cannot accommodate itself to the diversity of their wants. All that can be exacted from it, is, to offer the best possible chance of satisfying those wants. It is for each proprietor, who can and who ought to know the particular circumstances in which those who depend upon him will be placed at his death, to correct the imperfections of the law in all those cases which it cannot foresee. The power of making a will, is an instrument entrusted to the hands of individuals, to prevent private calamities.

2. The same power may be considered as an instrument of authority, entrusted to individuals, for the encouragement of virtue in their families, and the repression of vice. It is true that this means may be employed for the contrary purpose; but fortunately, such cases are an exception. The

interest of each member of a family is, that the conduct of every other member should be conformable to virtue, that is, to general utility. The passions may occasion accidental deviations; but the law must be arranged in conformity to the ordinary course of things. Virtue is the dominant regulator of society; even vicious parents are as jealous as others, of the honor and the reputation of their children. A man little scrupulous in his own conduct, would be shocked to have his secret practices disclosed to his family; at home he is still the apostle of probity; he disregards it in his own behavior, but he wishes it in those about him. In this point of view, every proprietor is entitled to the confidence of the law. Clothed with the power of making a will, which is a branch of penal and remunerative legislation, he may be considered as a magistrate, appointed to preserve good order in that little state, called a family. This magistrate may be guilty of partiality and injustice; and as he is restrained in the exercise of his power, neither by publicity, nor by responsibility, he would seem to be very likely to abuse it. But that danger is more than counterbalanced by the ties of interest and affection, which put his inclination in accord with his duty. His natural attachment to his children and his relatives, is as secure a pledge for his good conduct, as any that can be obtained for that of the political magistrate; to such a degree, that all things considered, the authority of this non-commissioned magistrate, besides being absolutely necessary to children of tender age, will oftener be found salutary than hurtful, even to adults.

3. The power of making a will, is advantageous under another aspect; as a means of governing, not for the good of those who obey, as in the preceding article, but for the good of him who commands. In this way, the power of the present generation is extended over a portion of the future, and to a certain extent, the wealth of each proprietor is doubled. By means of an order not payable till after his

death, he procures for himself an infinity of advantages, beyond what his actual means would furnish. By continuing the submission of children, beyond the term of minority, the indemnity for paternal cares is increased, and an additional assurance against ingratitude is secured to the father; and though it would be agreeable to think that such precautions are superfluous, yet when we recollect the infirmities of old age, we must be satisfied that it is necessary not to deprive it of this counterpoise of factitious attractions. In the rapid descent of life, every support on which man can lean, should be left untouched; and it is well that interest serve as a monitor to duty.

Ingratitude on the part of children, and contempt for old age are not common vices in civilized society; but we must recollect that everywhere, more or less, the power of making a will exists. Are these vices most frequent where this power is most limited? We might decide the question by observing what passes in poor families, where there is but little to give in legacies; but even that method of judging would be deceptive; for the influence of this power established in society by the laws, tends to form general manners; and general manners thus formed, determine the sentiments of individuals. This power given to fathers, renders the paternal authority more respectable; and those fathers whose indigence does not permit them to exercise it, unconsciously profit by the general habit of submission to which it has given rise.

But in making the father a magistrate, we must take care not to make him a tyrant. If children have their faults, he may have his; and though we give him the power of correction, it does not follow that he should have the right to punish by starvation. The institution called in France, a *legitime*, by which each child is protected against a total disinheritance, is a convenient medium between domestic anarchy and paternal tyranny. Even this provision the

father should have the power of taking away, for causes specified in the law, and judicially proved.

There is still another question. In default of natural heirs, shall the proprietor have the right of leaving his property to whomsoever he chooses, either to distant relations, or to strangers? In that case the fiscal resource, spoken of in the preceding chapter, will be greatly diminished; it will apply only to the case of intestates. Here the reasons of utility divide. We must endeavor to find some middle course.

It may be said, that in default of kin, the services of strangers are necessary to a man, and his attachment to them almost the same as to relations. He should have the means of cultivating the hopes and rewarding the care of a faithful servant, and of softening the regrets of a friend who has watched at his side, not to speak of the woman, who but for the omission of a ceremony would be called his widow, and the orphans, whom all the world but the legislator regard as his children.

Again; if to enrich the public treasury you deprive a man of the power of leaving his property to his friends, do you not force him to spend it all upon himself? If he has no control over his capital from the moment of his death, he will be tempted to convert his property into a life annuity. It is to encourage him to be a spendthrift, and almost to make a law against economy.

These reasons are doubtless more weighty, than any consideration of gain to the public treasury. We ought to leave the proprietor who has no near relations, the right of disposing of at least half his property by will, while the other half is reserved for the public; and to be contented with less, would perhaps in this case be a means of getting more. Besides, it is a matter of very great importance not to attack the principle which allows every one to dispose of his property after death; and not to create a class of proprie-

tors, who will regard themselves as inferior to others, on account of the legal incapacity attached to one half of their fortune.

All that has been said of alienations between the living, applies also to testaments. On most of these points we shall be instructed by the conformity between contracts and testaments, and sometimes by contrast.

The same causes of nullity which apply to alienations between the living apply to testaments, except that in the place of *concealment* on the part of the receiver, it is necessary to substitute *erroneous supposition* on the part of the testator. For example, I leave a certain legacy to Titius, who is married to my daughter, believing that marriage to be lawful, and not knowing the bad faith of Titius, who before marrying my daughter, had contracted another marriage still subsisting.

Testaments are exposed to an unfortunate dilemma. Do we admit their validity when made upon a death-bed? The testator is exposed to coercion and to fraud. Do we exact formalities incompatible with this indulgence? We deprive the dying man of his power over the conduct of others, at the very moment when he needs it most. Barbarous heirs may torment him, in order to hasten or make sure of the advantage of a will executed in form. A dying man who has no power to give or to take away, is no longer to be feared. A great many details will be necessary to reduce all these opposite dangers to their lowest amount.

## CHAPTER V.

*Rights to Services. Methods of acquiring them.*

AFTER things, services remain to be distributed, a kind of property sometimes confounded with things, and sometimes appearing under a distinct form.

There are as many kinds of services, as there are ways in which man can be useful to man, either in procuring him some good, or preserving him from some evil.

In that exchange of services which constitutes social intercourse, some services are free, and others are compulsory. Those which are exacted by the laws constitute rights and obligations. If I have a *right* to the services of another, that other is in a state of *obligation* with respect to me; these two terms are correlative.

At first, all services were free. It was only by degrees that laws intervened to convert the more important into positive rights. It was thus that the institution of marriage changed into an obligation legally binding, the hitherto voluntary connection between husband and wife, father and child. In the same way, the law in certain states, has converted into an obligation, the maintenance of the poor, a duty which yet remains, among the greater part of nations, entirely voluntary. These *political* duties, compared to duties purely *social*, are like enclosures in a vast common, where a particular kind of cultivation is carried on with precautions which ensure success. The same plant might grow on the common, and might even be protected by certain conventions; but it would always be exposed to more hazards than in the particular enclosure traced by the law, and protected by the public force.

Yet whatever the legislator may do, there is a great number of services upon which he has no hold. It is not



possible to order them, because it is not possible to define them; or because constraint would change their nature, and make them an evil. If it were attempted to enforce them by law, an apparatus of police and of penalties would be necessary, which would spread terror through society. Besides, the law could not act against the actual obstacles opposed to it; it could not put dormant powers into activity; it could not create that energy, that superabundance of zeal, which surmounts difficulties, and goes a thousand times further than commands.

The imperfection of law, in this respect, is corrected by a kind of supplementary law; that is, by the moral or social code, a code which is not written, which exists only in opinion, in manners and in habits, and which begins where the legislative code finishes. The duties which it prescribes, the services which it imposes, under the names of equity, patriotism, courage, humanity, generosity, honor and disinterestedness, do not directly borrow the aid of the laws, but derive their force from other sanctions, founded upon punishments and rewards. As the duties of this secondary code have not the imprint of the law, their fulfilment has more éclat, it is more meritorious; and a superior degree of honor attached to their performance, happily makes up for their deficiency in positive force. After this digression upon morals, let us return to legislation.

The kind of service which is most important consists in giving up some good in favor of another.

The kind of good which plays the greatest part in civilized society is, money,—a representative of value which is almost universal. It thus happens, that the consideration of *services*, is often confounded with that of *things*.

There are cases, where the service is exacted for the benefit of him who commands; such is the state of a master in reference to his servant.

There are cases in which the service is exacted for the

advantage of him who obeys; such is the condition of the ward in reference to his guardian.

These two correlative states are the foundation of all the others. The rights which belong to them, are the elements of which all the others are composed. The father ought to be in some respects the guardian, in others, the master of the child; the husband ought to be in some respects the guardian, in others, the master of the wife. These states are capable of a constant and indefinite duration, and form domestic society. The rights which ought to be attached to them are discussed in subsequent chapters.

The public services of the magistrate and the citizen constitute other classes of obligations, of which the establishment belongs to the constitutional code.

But beside these constant relations, there are transient and occasional relations, in which the law may exact the services of one individual in favor of another.

The means of acquiring rights to services, that is, the causes which determine the legislator to create obligations, may be referred to three heads:—1st. *Superior need.* 2d. *Anterior service.* 3d. *Pact or Agreement.*

I. *SUPERIOR NEED*; that is, *a need of the service greater than the inconvenience of rendering it.*

Every individual has, as a constant occupation, the care of his own happiness; an occupation not less lawful than necessary; for suppose this principle could be reversed, and that the love of others should take an ascendancy over the love of self, what a ridiculous, what a fatal confusion would be the consequence! However, there are many occasions when we can make a considerable addition to the well-being of others, by a slight and almost imperceptible sacrifice. In such circumstances, to do what depends upon us to prevent the evil about to fall upon another, is a service which the law may exact; and the omission of this service, in cases where the law might see fit to exact it, would form a sort of

offence, which might be called *negative*, to distinguish it from *positive offences*, which consist, in being the active and instrumental cause of evil.

But to make efforts however slight, in the service of another, may be an evil; to be obliged to make such efforts, certainly is one; for all restraint is evil. Therefore, to justify exacting from *you* a service in favor of *me*, the evil of not receiving the service ought to be so great, and the evil of rendering it so small, that there can be no room for hesitation as to the expediency of producing the one, for the sake of avoiding the other. There are no means of fixing precise limits; all must depend on the circumstances in which the individuals interested, are placed; and we must leave to the judge, the power of deciding upon individual cases as they occur.

The good Samaritan, by relieving the wounded traveller, saved his life. It was a noble action, a virtuous deed, nay, a moral duty. Can such actions be made a legal duty? Can we ordain them by a general law? No;—not unless we limit that law by exceptions more or less vague. It would be very necessary to establish in such a law, a dispensation in favor of the surgeon waited for by many wounded men in great need of his services,—of the officer, who hastens to his post to repel the enemy,—of the father, who is rushing to the succor of his child.

This principle of superior need, is the foundation of many obligations. The duties required of a father to his children may be burdensome; but that evil is nothing when compared to the evil of the children being abandoned. The duty of defending the state may be more burdensome yet; but unless the state is defended, it cannot exist. If the taxes are not paid, the government is dissolved. If the public functions are not exercised, a career is opened to every disorder and to every crime.

The obligation of rendering the service ought to fall upon

a particular individual, by reason of his peculiar position, which gives him more than any other person, the power or the inclination to perform it. It is for this reason that in selecting guardians for orphan children, the choice falls upon relations or friends, to whom the duty must be less burdensome than to a stranger.

II. ANTERIOR SERVICE; *a service rendered,—in consideration of which there is exacted from him who received the benefit, a compensation, an equivalent, in favor of him who conferred it.*

This case is more simple; it is only necessary to ascertain the value of a benefit already received, and to assign a compensation for it. The judge will not need so much latitude of discretion.

A surgeon has bestowed his services upon a sick man who had lost his senses, and who was not in a condition to ask for assistance. A depositary, though not requested to do so, has employed his labor, or has made pecuniary advances, for the preservation of a deposit. A man has exposed himself in a fire, to save valuable property, or to rescue persons in danger. The effects of a passenger have been thrown overboard to lighten the ship, and to preserve the rest of the cargo. In all these cases, and in a thousand others which might be cited, the laws ought to insure a recompense equivalent to the value of the service.

This title to indemnity is founded upon the best reasons. Grant it, and he by whom it is furnished will still be a gainer; refuse it, and you leave him who has done the service, in a condition of loss.

Such a regulation is less for the benefit of him who receives the compensation, than for the benefit of those who need the service. It is a promise of indemnity made beforehand, to every man who may have the power of rendering a burdensome service, in order that a prudent regard to his own personal interest may not come into opposition with his

benevolence. Who can say how many evils might be prevented by such a precaution? In how many cases may not the duty of prudence restrain the wishes of benevolence? Is it not wise for the legislator, as far as possible, to reconcile these motives? It is said, that ingratitude was punished at Athens, as an infidelity injurious to the commerce of benefits. I do not propose to punish ingratitude; but as far as possible to prevent it. If the man to whom you have rendered a service is ungrateful,—no matter; the law does not count upon virtue; it assures you a compensation; and in important cases, it will elevate that compensation to the level of reward.

Reward! that is the true means of obtaining services. In comparison, punishment is but a feeble instrument. To punish an omission of service, we must first be sure that the individual had the power to render it, and that he has no excuse for not having done so. All this requires a process of investigation, difficult and doubtful. Besides, if men act from the fear of punishment, nothing will be done except what is absolutely necessary to avoid it; but the hope of reward develops an unknown strength; it triumphs over real obstacles, and brings forth prodigies of zeal and ardor in cases where threats would produce only an unwilling submission.

Three precautions must be observed, in arranging the interests of the two parties. First,—to prevent an hypocritical generosity from converting itself into tyranny, and exacting the price of a service, which would not have been accepted, had it not been supposed disinterested. Secondly,—not to authorize a mercenary zeal to snatch rewards for services which the person obliged might have rendered to himself, or have obtained elsewhere, at a less cost. Thirdly,—not to suffer a man to be overwhelmed by a crowd of helpers, who cannot be fully indemnified without counterbalancing by an equivalent loss, the whole advantage of the service.

*Anterior service* justifies many classes of obligations. On this is founded the right of fathers over their children. When in the order of nature, the strength of ripening age has succeeded to the feebleness of infancy, the need of receiving ceases, and the duty of restitution begins. Upon this also is founded the right of the wife to the continuance of the union after the period when time has effaced the attractions which were its first motive.

Establishments at the public expense, for those who have served the state rest upon the same principle;—reward for past services as a means of creating future ones.

III. PACT OR AGREEMENT; *the intervention of a promise between two persons, with the understanding that a legal obligation attaches to it.*

Everything that has been said of *consent*, in relation to the distribution of property, applies to consent, as respects the interchange of services. There are the same reasons for sanctioning this interchange of services, as for sanctioning the interchange of property. Both rest on the same fundamental axiom, *that every alienation imports an advantage.* Bargains are not made except from the motive of utility.

The same reasons which annul consent in the one case, annul it in the other—Concealment; fraud; coercion; subornation; erroneous idea of legal obligation; erroneous idea of value; incapacity; pernicious tendency of the bargain though without fault in the contracting parties.

We need not enlarge upon those subsequent causes which produce the dissolution of agreements:—1st. *Accomplishment.* 2d. *Compensation.* 3d. *Express or tacit remission.* 4th. *Lapse of time.* 5th. *Physical impossibility.* 6th. *Intervention of a superior inconvenience.* In all these cases, the reasons which caused the agreement to be sanctioned, exist no longer; but the two latter relate only to the literal or specific accomplishment of the bargain, and may still leave room for compensation. If in a mutual bargain, one

of the parties only has fulfilled his part, or if his part be the more nearly performed, a compensation from the other will be necessary to re-establish the equilibrium.

\* It is enough to point out the principles without dwelling on the details. Particular arrangements must vary according to circumstances. However, if we establish firmly a small number of rules, these particular arrangements will not interfere with each other, and will all be arranged in the same spirit. These rules are so very simple that they need no development.

1st. Avoid producing disappointment.

2d. When a portion of that evil is inevitable, diminish it as much as possible, by dividing the loss among the parties interested, in proportion to their means.

3d. Take care in the distribution, to throw the greater part of the loss upon him who by attention might have prevented the evil, so as to punish his negligence.

4th. Avoid especially producing an accidental evil greater than disappointment.

*General Observation.* It is thus that the whole theory of obligations, may be made to rest upon the basis of utility. We have built the whole of this vast edifice upon three principles—*superior need, anterior service, pact or agreement.* Who would have believed that to arrive at principles so simple and so familiar, it would have been necessary to open a new road? Consult those masters of the science, Grotius, Puffendorf, Burlamaque, Vatel, Montesquieu himself, Locke, Rousseau, and the crowd of commentators. When they wish to lay open the origin of obligations, they tell you of a natural right, of a law anterior to man, of the divine law, of conscience, of a social contract, of a tacit contract, of a *quasi* contract, &c. &c. I know that these terms are not incompatible with the true principle, because all of them, by explanations more or less forced, may be made to signify good and evil. But this oblique and roundabout

process involves uncertainty and embarrassment, and leads to interminable disputes.

They have not perceived that the pact, the contract of which they tell us, strictly speaking, is not a reason in itself; and that it wants a basis, an original and independent reason, on which to rest. The pact serves to prove the existence of a mutual advantage on the part of the contractors. It is this reason of utility, which gives the contract all its force; thereby it is that the cases are distinguished in which a contract ought to be confirmed, as well as those in which it ought to be annulled. If a contract were a reason of itself, it ought always to have the same effect. If a pernicious tendency makes it void, it must be a useful tendency which makes it valid.

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## CHAPTER VI.

### *Community of Goods, or tenancy in common. Its Inconveniences.*

THERE is no arrangement more contrary to the principle of utility, than community of goods; especially that kind of indeterminate community, where the whole belongs to each of the partners.

1. It is the source of never-ending discord. Instead of being a state of satisfaction and enjoyment for all interested, it is a state of discontent and disappointment.

2. This undivided property always loses a great part of its value for all the partners. Subject on the one hand, to all kinds of depredations, because it is not under the protection of individual interest, on the other, it receives no repairs or improvements. Shall I risk an expense of which the burden will be certain, and which will fall entirely upon me, while the benefit of it will be precarious and divided?



3. The apparent equality of this arrangement only serves to cover a real inequality. The strong abuse their strength with impunity; and the rich grow richer, at the expense of the poor. The community of goods calls to mind that sort of monster which is sometimes seen to exist,—beasts joined together back to back; in such cases, the stronger always carries off the weaker.

The question is not here, of the community of goods between husband and wife. Called to live together, to cultivate their interests together, and to feel a mutual concern for the interests of their children, they ought to enjoy in common a fortune often acquired, and always kept by common cares. Besides, if their wills conflict, the dispute will not be lasting; the law confers upon the husband the right to decide.

Nor is the question here, of common property among partners in trade. That tenancy in common is confined merely to acquisition; it has nothing to do with enjoyment. Now, as concerns acquisition, the partners have but one and the same interest. When the gains are to be enjoyed, they are divided, and each partner becomes independent of the others. Besides, associates in commerce are always few in number; they select each other, and separate at will. It is precisely the contrary with joint proprietors of land.

In England, one of the greatest and best established improvements, is the division of commons. In passing through the lands which have undergone that happy change, we are enchanted as by the sight of a new colony. Harvests, flocks, smiling habitations, have succeeded to the dull sterility of a desert. Happy conquests of peaceful industry! Noble aggrandizement, which inspires no alarms, and provokes no enemies! But who would believe that in a country where agriculture is so highly estimated, millions of acres of productive land are still abandoned to the wild state of common tenancy? A short time since, the government, desirous of knowing the true condition of its territory,

caused an examination to be made in every county, which has brought to light a truth so interesting, and so calculated to produce important consequences.\*

The inconveniences of tenancy in common, except in accidental cases, do not apply to the case of *servitudes*, that is, to rights of partial property exercised over immovables, such as a right of passage, or a right to draw water. These rights are in general, limited; the value lost by the subject property, is not equal to the value acquired by the property to which the right attaches; or in other terms, the inconvenience to the former is not so great as the conveniency to the latter.

In England, land, which being *freehold*, is worth thirty times the annual rent, being *copyhold*, is worth but two thirds as much. The reason is, that in the latter case, a lord of the manor possesses certain rights, which establish a kind of common tenancy between him and the principal proprietor. But it is not to be supposed that what is lost by the copyholder is gained by the lord; for the greater part of it falls into the hands of agents and attorneys, and is consumed in useless formalities and minute vexations. These are the remnants of the feudal system.

It is a fine spectacle, says Montesquieu, that of the feudal laws,—and afterwards he compares them to an ancient and majestic oak. Let us rather compare them to that fatal tree whose sap is poisonous, and whose shade is destructive. That unfortunate system has produced in modern laws a

\* There are circumstances which justify exceptions to general rules. The citizens of the small Swiss cantons, for example, possess the greater part of their lands, to wit, the High Alps, in common. It may be that this arrangement is the only one convenient for pasturages which are practicable only a part of the year. It may be too, that this method of holding their lands, forms the necessary basis of a constitution purely democratic, well adapted to the condition of a little community, shut up in an enclosure of mountains.

confusion and complexity from which it is very difficult to deliver them; for being everywhere interlaced with property, it needs much management to get rid of feudal absurdities, without shaking the security of property itself.

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## CHAPTER VII.

### *Distribution of Loss.*

THINGS make one branch of the objects of acquisition; *services*, the other. After having treated of the different methods of acquiring and alienating these two objects, the analogy between gain and loss would seem to indicate as the next point of inquiry, the different methods of distributing the losses to which possessions are exposed.

This task will not detain us long. Has a thing been destroyed, damaged, or lost? If the proprietor is known, the loss falls upon him; if he is not known, it falls upon nobody. It is in fact no loss. The question whether the loss shall be transferred to some other person than the proprietor, that is, whether in any case, a *satisfaction* shall be allowed him, is a matter which will be discussed in that part of this work which treats of the Penal Code. I shall confine myself here to a single example, which will serve to indicate principles.

When the seller and buyer of an article of merchandise are at a distance apart, the article must pass through a greater or less number of intermediate hands. This transport is by land, by sea, or by internal navigation; the merchandise may be destroyed, damaged, or lost; perhaps it does not arrive at its destination, or it does not come there in the state in which it ought to be. Upon whom shall the loss fall? the buyer or the seller? I say the seller, reserv-

ing his claim against the intermediate agents. The seller by care, may contribute to the safety of the merchandise; he can choose the moment and the manner of sending it, and take the precautions on which, in case of loss, the acquisition of evidence depends. All this would be easier to a merchant who makes a business of selling, than to an individual who buys. It is only by accident that the care of such a buyer can contribute in any way to the safe arrival of the goods. The *reason* of this decision is a superior preventive power; it is founded upon the *principle* of security.

Particular situations may show the necessity of establishing exceptions to this general rule. For a yet stronger reason, individuals may except themselves from it, by agreements made between themselves. I only indicate principles. This is not the place for their application.

## PART THIRD.

### RIGHTS AND OBLIGATIONS ATTACHED TO SEVERAL PRIVATE CONDITIONS.

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#### INTRODUCTION.

WE now proceed to consider more in detail, the rights and obligations which the law ought to attach to the different states which compose the domestic or private condition. These states may be resolved into four: those of master and servant; guardian and ward; father and child; husband and wife.

If we followed the historical or natural order of these relations, the last in the catalogue would become the first. But to avoid repetitions, it is better to begin with the simplest. The rights and obligations of a father and a husband, are composed of the rights and obligations of a master and a guardian; the two former states are the elements of the two latter.

## CHAPTER I.

*Master and Servant.*

ASIDE from the question of slavery, there is not much to be said as to the condition of *master*, and the correlative conditions created by the different kinds of *servants*. All these conditions are a matter of contract. It belongs to the parties interested to arrange them according to their own convenience.

The condition of *master* to which the condition of apprentice corresponds, is a mixed condition. The master of an apprentice is at the same time a master and a guardian; a guardian as respects the art he teaches; a master as regards the profit he derives.

The work which the apprentice does, after the value of his labor is worth more than the expense of maintenance and instruction, is the salary or reward of the master for his anterior expenses.

This compensation ought naturally to be greater or less, according to the difficulty of the art. Some arts may be learned in seven days; it is possible that some others may require seven years. Competition will best regulate the price of these mutual services, as of all other objects of commerce; and here as elsewhere, industry should find its just reward.

But the greater part of governments have not adopted this system of liberty. They have desired to introduce what they call order, into employments; that is, out of a mere passion for regulating, they have substituted an artificial for a natural arrangement. Intermeddling, in this way, with a business which they do not understand, they have been led by a false notion of uniformity, to apply the same rule to things which have no resemblance. Thus the

ministers of Elizabeth fixed the same term of seven years as the period of apprenticeship for the simplest, as well as for the most difficult arts.

This mania for regulation conceals itself under the pretence of a desire to perfect the arts, to prevent workmen from being unskilful, or to guard the credit and honor of the national manufactures. But there is a simple and natural means of accomplishing these objects. It is, to leave every body a perfect liberty of choosing the good and rejecting the bad, of being governed in their preferences by merit; and to excite the emulation of artists by the freedom of competition. But no; the public must be supposed incapable of judging; and the work must be regarded as good, if the workman has wrought at the trade a certain number of years.

An artist must not be asked if he understands his business, but whether he has served a regular apprenticeship. For if the work is to be judged by its merits, we may as well allow every one to work at his own risk. According to that system, some would be masters who had never been apprentices, and others would be apprentices all their lives.

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## CHAPTER II.

### *Of Slavery.*

WHEN servitude becomes a condition, and when the obligation to continue in that condition, with respect to a certain master, or to others who may derive a title from him, embraces the entire life of the servant, that condition is *slavery*.

Slavery is susceptible of many modifications, according to the fixed amount, more or less exact, of the services

which may be demanded, and according to the coercive means, the use of which is permitted. There was a great difference in the state of a slave at Athens and at Lacedæmon; there is more yet between that of a Russian serf and a negro in the colonies. But whatever may be the limits or the means of authority, if the obligation of serving is unlimited in point of time, I still call it *slavery*. To draw a line of separation between servitude and liberty we must start from some point; and that above assumed seems to be the most salient, and the easiest to fix.

This distinction drawn from *perpetuity* is so much the more essential, because wherever such perpetuity is found, it weakens, it enervates, it renders extremely precarious the wisest precautions for mitigating the exercise of authority. A power not limited as regards time, can hardly be limited as regards anything else. If we consider, on the one side, the facility with which the master may aggravate the yoke, little by little, how he can exact with rigor the services that are due, extend his pretensions under different pretexts, and spy out occasions to torment an insolent servant, who dares refuse to render services which he does not owe;—if we consider, on the other side, how difficult it is for slaves to demand or to obtain legal protection, how much more vexatious their domestic situation becomes, after a public breach with their master; and how they will be driven to captivate him by an unlimited submission, rather than to irritate him by refusals;—we shall soon see that the project of limiting slavery by law is much easier to form than to execute; that a fixed amount of services is a very feeble means of softening the lot of slavery; that under the best laws for that purpose, only the most crying infractions will be punished, while the ordinary course of domestic rigors will outbrave every tribunal. I do not say that on this account slaves ought to be abandoned to the absolute power of a master, and that the protection of laws should not be extended to



them, because that protection is insufficient. But it is necessary to show the evil inherent in the very nature of the thing ; to wit, the impossibility of submitting to a legal restraint, the authority of a master over his slaves, so as to prevent him, if so disposed, from abusing his power.

That slavery is agreeable to the masters, does not admit of a doubt ; since nothing is wanting but will on their part to bring it to an instant termination. That it is disagreeable to the slaves, is a fact not less certain, since they are never kept in that condition but by constraint. No one who is free wishes to become a slave ; and there is no slave who does not wish to be free.

It is absurd to reason on the happiness of men except from their own desires, and their own sensations. It is absurd to attempt showing, by calculations, that a man ought to be happy, when he is actually miserable ; and that a condition into which no one wishes to enter, and from which everybody wishes to escape, is a condition good in itself, and adapted to human nature. I can well believe that the difference between liberty and servitude is not so great as it appears to ardent and prejudiced minds. The habit of evil, and for a stronger reason, the ignorance of any thing better, take away much of the interval which separates two conditions, at the first glance, so opposite. But these reasonings of probability upon the happiness of slaves, are quite superfluous, since we have complete proof that this condition is never embraced by choice ; and that on the contrary, it is always an object of aversion.

Slavery has been compared to the condition of a school-boy prolonged through life ; and it is added that a great many people think the time passed at school the happiest part of their existence.

The parallel is just only in one point. The circumstance which is common to these two states is, subjection ; but subjection is very far from being the circumstance which

makes the happiness of a schoolboy. What makes him happy is, a freshness of mind which gives to all impressions the charm of novelty ; lively and boisterous pleasures with companions of the same age, contrasted with the solitude and seriousness of the paternal dwelling. And after all, how many schoolboys are there, who are not anxious to see their pupilage ended ? Which of them desires to be a schoolboy for life ?

Be this as it may, if slavery were established in such a proportion, that there was one slave for one master, possibly I might hesitate, before pronouncing upon the balance between the advantage of the one, and the disadvantage of the other. It might be possible, all things considered, that the sum of good in this arrangement would be almost equal to the sum of evil. But things cannot be so arranged. Where slavery is once established, it presently becomes the lot of the greater number. A master counts his slaves like his flocks, by hundreds, thousands, tens of thousands. The advantages are on the side of one, the disadvantages, on the side of a multitude. Though the evil of servitude were not great in itself, the extent of that evil would be sufficient to render it very considerable. Generally speaking, and aside from every other consideration, there is no room at all for hesitating between the loss which emancipation would bring upon the masters, and the gain which it would confer upon the slaves.

Another very strong argument against slavery, is drawn from its influence upon the wealth and power of nations. A freeman produces more than a slave. If the slaves of a master were set at liberty, that master would doubtless lose a part of his property ; but the slaves taken together, would not only possess all that he loses, but more too. Now happiness necessarily increases with abundance ; and the public power increases in the same proportion.

Two circumstances combine to diminish the produce of

slaves: the absence of the stimulus of reward, and the insecurity of their condition.

It is easy to see that the fear of chastisement is not well adapted to extract from a laborer all the industry of which he is capable, all the values he can furnish. Fear rather leads him to conceal his power than to show it; rather to sink beneath his true level than to rise above it.

He will bring a punishment upon himself by works of supererogation; by displaying his ability he will only cause the standard of his ordinary duty to be raised. Not only the slave produces less; he consumes more,—not in the way of enjoyment, but by waste, pillage, and bad economy. What does he care for interests not his own? All the labor he can save himself is a pure gain; what he suffers to perish is a loss only to his master. Why should he invent new means to do more, or to do better? To improve, one must think; and thinking is a trouble not taken without a motive. The man who is sunk into a mere laboring animal, never rises above a blind routine; and generations succeed each other, without any progress.

It is true that a master who understands his own interest, will not dispute with his slaves the little profits which their industry may occasionally procure. He knows their prosperity to be his own, and that to offer them the inducement of an immediate reward, is the surest way to animate them to labor. But this precarious favor, dependent upon the uncertain disposition of a master, does not inspire that confidence which carries one's views to the future, which shows in daily economy the foundation of future wealth, and which extends the care of fortune to posterity. Slaves clearly perceive, that if richer, they would be exposed to extortion, if not upon the part of their master, at least from overseers, and other subalterns in authority, more greedy and more to be dreaded than the master himself. For the greater part of slaves there is no to-morrow. Joys instantly

to be realized, alone have power to tempt them. They are gluttonous, idle, dissolute, without reckoning the other vices which spring from their condition. Those who have any foresight, hide their little treasures. The sad feeling of insecurity, inseparable from their condition, nourishes all the faults destructive of industry, and all the habits most fatal to society, and that too without compensation and without remedy. This is not an empty theory. It is an actual result, at all times, in all places.

But we are told that in respect to labor, the free day-laborer in Europe is nearly upon the same footing with the slave. He who is paid by the piece has recompense as a motive, and every effort has its reward; but he who is paid by the day, has no motive but pain; let him do much or little, he receives the price of a day's work; so that in fact there is no reward for exertion. If he does less than ordinary workmen, he may be dismissed from his employment, as a slave, in the like case, would be beaten. Both are excited only by fear, and have no interest in the produce of their labor.

To this reasoning there are three replies:—1st. It is not true that the day-laborer has not the motive of reward. The more skilful and the more industrious, are better paid than others. Those who distinguish themselves, are more constantly employed, and always have the choice of the most lucrative engagements. This is a real reward attendant upon their exertions.

2d. If the only motives of the free workman were in fact of the penal kind, still we should have more hold on him than on a slave. The free workman has his honor like the rest of us. In a free country there is a shame attached to the reputation of being idle and incapable; in this respect, the eyes of his comrades are an addition to those of his employer, and this punishment of honor is inflicted upon an infinity of occasions, by judges who have

no interest to soften it. Free laborers exercise in this way a reciprocal inspection, and are sustained by emulation. This motive has much less force upon a slave. The treatment to which slaves are subjected, renders them little sensible to a pain so delicate as that of honor; and as the injustice of laboring without compensation, for the sole benefit of another, cannot escape them, slaves are not ashamed to avow to each other a repugnance to labor, in which they all agree.

3d. That which presents itself to a day-laborer as a gain, is a sure gain; all that he can acquire belongs to himself, and nobody has any right to touch it; but as we have seen above, a slave cannot enjoy any real security. Exceptions to this remark may be cited. Such a Russian lord, for example, has industrious slaves who possess many thousand roubles, and who enjoy their property in the same way as their master enjoys his. But these are particular cases which do not change the ordinary rule. Such particular and unusual incidents are of no importance in judging of the ordinary effects of a general arrangement.

In this short exposition of the inconveniences of servitude, there has been no attempt to move the feelings, no appeal to the imagination, no endeavor to cast odium upon masters by generalizing particular abuses of power. There has been an omission of all reference to those terrible means of rigor and constraint, common in these domestic governments, without law, without procedure, without appeal, without publicity, and almost without restraint; for as we have already seen, the master is never responsible, except in extraordinary cases. Every thing which touches the feelings is easily accused of exaggeration; and in this case the evidence of simple reason is so strong, that it needs no suspicious coloring. The owners of slaves, whom personal interest has not divested of common sense and of common humanity, will readily assent to the advantages of liberty

over servitude, and would themselves desire that slavery were abolished, if that abolition could take place without overturning their rank and fortunes, and without any shock to their personal security. The injustice and the calamities which have accompanied precipitate attempts, form the greatest objection to projects of emancipation.

This operation could not take place suddenly, except by a violent revolution, which by displacing all men, by destroying all property, by putting all persons into situations to which they had not been educated, would produce evils a thousand times greater than all the immediate good which could be expected from it.\*

Instead of rendering emancipation burdensome to the master, it ought, as far as possible, to be rendered advantageous to him; and the first means which naturally offers itself to this end, is, to fix a price at which every slave shall have the right to purchase his freedom. Unfortunately there is a strong objection to this means. From the moment of its adoption, the interest of the master is in opposition to that of his slaves. He will attempt to prevent them from acquiring the sum necessary to their ransom. To leave them in ignorance, and to keep them in poverty, to cut their wings as fast as they grow, such will be his policy. But this danger arises only from fixing the price. The liberty of redeeming themselves at such prices as may be agreed upon, has no inconvenience. The interest of the slave would induce him to do his best, in order that he might have a greater price to offer. The interest of the master would induce him to suffer the slave to grow rich as fast as possible, in order to draw from him a heavier ransom.

\* Recent experience in the West Indies seems to contradict this theory; so does the case of the Polish lordships, cited in the last paragraph of the chapter.—*Translator.*

A second means consists in limiting the power to dispose of slaves by will, so that where there is no successor in the direct line, emancipation shall be a right. The hope of inheritance is always very feeble in distant successors; and no such hope would exist, after the law was once known. There could be no injustice where there was no disappointment.

We might go a little further. At each change of the proprietorship, even in successions the nearest, a small sacrifice of property might be made to liberty, by the liberation, for example, of a tenth part of the slaves. Such a loss would not present itself to the heir, as of any determinate amount. The defalcation of a tenth part of the inheritance would scarcely be perceptible. At the moment of succeeding to the estate it would be less a loss, than a slight privation of gain. As respects nephews who have an additional hope of succession on the side of their fathers, the tax in favor of liberty might be still greater.

This offering to liberty ought to be determined by lot. Choice, under pretext of selecting the most worthy, would be a source of intrigues and abuse. It would be more fruitful in discontent and jealousy than in happiness. The lot is impartial; it gives to all an equal chance of happiness; even those whom it does not favor it allows to participate in the charm of hope, and the fear of being deprived of this chance for certain specified offences, would be an additional pledge for the fidelity of the slaves.\*

\*This means might tempt the slaves to employ murder to accelerate their liberty,—a very serious objection to this lottery. We may observe however, that its uncertainty would lessen the danger. There would be less temptation to commit a crime, the fruits of which might go entirely to others. But the temptation may be wholly got rid of, if it were provided that this partial emancipation should not apply to cases where the master was poisoned or assassinated, either by his slaves or by some one unknown. In this way, this means of liberation would become a safeguard to the master.

The emancipation ought to take place by families rather than individually. A father enslaved and a son free,—a father free and a son enslaved,—what a disagreeable, what a shocking contrast ! what a source of domestic chagrin !

There might be other means of accelerating an object so desirable ; but they can only be discovered by studying the particular circumstances of each country.

These bonds of slavery which the legislator cannot cut at a single blow, time dissolves little by little ; and the march of liberty though slow, is not the less sure. The whole progress of the human mind, of civilization, of morals, of public wealth, and of commerce, brings on little by little, the restoration of individual liberty. England and France have been what Russia, Poland and a part of Germany now are.

Proprietors ought not to be alarmed at this change. Those who own the land have a natural power over those who can live only by their labor. The apprehension that freemen, at liberty to go where they choose, would abandon their native soil and leave the earth uncultivated, is a fear absolutely chimerical, especially when the emancipation goes on gradually. Because it is seen that the slave runs away when he can, it is concluded that were he free, still he would run away. The opposite conclusion would be much more just. The motive for flight exists no longer, and the motives for remaining retain all their force.

We have seen in Poland, some proprietors, enlightened as to their true interest, or animated by a love of glory, carry into effect throughout vast lordships, a total and simultaneous emancipation. Did this generosity ruin them ? Just the contrary ; the farmer having an interest in his own labor, has soon put himself into a condition to pay more than the slave ; and the domains cultivated by the hands of freemen, receive every year an addition to their value.



## CHAPTER III.

*Guardian and Ward.*

THE feebleness of infancy demands a continual protection. Everything must be done for an imperfect being, which as yet does nothing for itself. The complete development of its physical powers takes many years; that of its intellectual faculties is still slower. At a certain age, it has already strength and passions, without experience enough to regulate them. Too sensitive to present impulses, too negligent of the future, such a being must be kept under an authority more immediate than that of the laws; it must be governed by punishments and rewards, which act, not at distant intervals, but continually, and which can adapt themselves to all the details of conduct, during the process of education.

In order that a condition of life, or a profession, may be chosen for a child, he must of necessity be submitted to a particular authority. This choice is founded upon personal circumstances, upon the expectations, the talents, the inclinations of the pupil; upon his facility for adopting one business rather than another; in one word, upon probabilities of success. It is a question too complicated to be left to the decision of a public magistrate; it must be determined specially for every case; and such a determination would demand a knowledge of details, which the magistrate could not possess.

This power of protection and of government, over individuals thought incapable to protect and to govern themselves, constitutes *wardship*; a kind of domestic magistracy, founded upon the manifest need of those who are submitted

to it, and which ought to include all the powers necessary to the fulfilment of its object, and nothing more.

The powers necessary to education are those of determining the ward's method of life, and of fixing his domicile, with those means of reprimand and of correction, without which this authority would not be efficacious. The severity of these means may be the more easily limited, inasmuch as their application is more immediate, more certain and more varied; and because domestic government possesses an inexhaustible fund of rewards; for at an age when nothing is acquired and everything is bestowed, there is no concession which may not take the form of remuneration.

As to the subsistence of the ward, it can be derived from three sources only—either from property he possesses in his own right; from a gratuitous gift; or from his own labor.

If the ward has property of his own, it is administered in his name and for his advantage by the guardian; and all that the guardian does in that particular, according to the prescribed forms, is ratified by the law.

If the ward have no property, he is supported either at the expense of the guardian,—as in the case most common of all, when the wardship is exercised by the father or mother of the child; or at the expense of some charitable establishment; or finally, by his own labor, as when, for example, he is bound an apprentice, in such a way, that the period of non-value shall be made up to his master by the profitable labor of a subsequent period.

Wardship being a charge purely burdensome, it is made to fall upon those persons who have the greatest inclination to sustain it, and the greatest facility for doing so. This is eminently the case with the father and mother. Natural affection disposes them to this duty more strongly than the law; yet the law which imposes it upon them is not useless.

It is because instances occur in which children are abandoned by their parents, that this abandonment has been made an offence.

If the father when dying, names a guardian for his child, it is to be presumed that he knew better than any one else who had the means and the inclination thus to supply his place. His choice therefore should be confirmed, unless there are very strong reasons to the contrary.

If the father has made no provision for the wardship, the obligation ought to fall upon some relation, whose interest would induce him to preserve the family property, and whose honor and affection would be a security for the happiness and education of the child. In default of relatives, some friend of the orphan should be chosen, who would voluntarily undertake the office; or some public officer, appointed for that special purpose.

Some attention should be paid to those circumstances which ought to release particular individuals from the duty of wardship,—such as advanced age, a numerous family, infirmities, or reasons of prudence and delicacy, such, for example, as a complication of interests.

Particular precautions against the abuse of this power are to be found among the penal laws. An abuse of authority as respects the person of the child, belongs to the class of personal injuries; illicit gains at the expense of the ward's fortune, fall into the class of fraudulent acquisitions. The only thing to be considered is, the particular *circumstance* of the offence, namely, *the violation of confidence*. But though this renders the offence more odious, it is not always a reason for augmenting the punishment; on the contrary, as we shall see elsewhere, it is often a reason for diminishing it; the position of the delinquent being such that the discovery of the offence is easier, the reparation easier, and the alarm not so great. In the case of seduction, the character of guardian is an aggravation of the crime.

As regards general precautions, the wardship has often been divided ; the administration of the property has been given to the nearest heir, who in quality of heir had the greatest interest in its good management ; and the care of the person to some other relative more interested in the welfare of the child.

Some legislators have taken further precautions, such as forbidding guardians to buy the goods of their wards ; or permitting wards to re-assume property sold by their guardians, within so many years after their majority. The first of these two means, does not appear liable to great inconveniences ; the second cannot but affect the interest of the ward ; for it diminishes the price of his property, in the same proportion that its value is diminished in the hands of the purchaser, on account of the precariousness of his possession,—a precariousness which prevents him from making any improvements ; for in the end, they might turn to his disadvantage, by furnishing the former owner an additional motive to reclaim the possession. These two means appear useless, if the sale of the property is required to be public, and under the inspection of a magistrate.

The most simple means of protection is, to allow anybody to act as the friend of the ward in legal processes against his guardian, whether for mismanagement of the property, for negligence, or for violence. The law thus puts those who are too feeble to protect themselves, under the protection of every man, generous enough to undertake the charge.

Wardship being a state of dependence, is an evil which ought to cease as soon as there is no danger that its cessation will produce a greater evil. But what should be the age of emancipation ? As to that matter, we must be guided by general presumptions. The English law which has fixed upon the age of twenty-one years, seems much more reasonable than the Roman law, which has appointed the

age of twenty-five for that purpose, and which has been followed throughout almost the whole of Europe. At twenty-one, the faculties of man are developed; he has a perception of his strength; he yields to counsel what he refuses to authority; and can no longer bear to be kept in leading-strings. So strong is this feeling, that the prolongation of the domestic power often produces a state of irritation and ill-nature equally uncomfortable for all concerned. But there are individuals who seem incapable of arriving at maturity, or who are much slower than others in reaching it. Cases of that nature may be easily provided for, by prolonging the guardianship whenever occasion for it occurs.

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## CHAPTER IV.

### *Father and Child.*

It has been already mentioned, that a father is, in some respects, the master, in others, the guardian of the child.

In his character of master, he will have the right to impose services upon his children, and to employ their labor for his own advantage, till the age at which the law establishes their independence. This right, given to the father, is an indemnity for the pains and expenses of the children's education. It is well that the father should have an interest and a pleasure in the education of his children. The advantage which he finds in bringing them up, is a good thing for both parties. In his quality of guardian, he has all the rights and all the obligations which have been mentioned under that title.

Under the first relation, the advantage of the father is

considered; under the second, that of the child. These two relations are easily reconciled in the person of the father, on account of his natural affection, which leads him much rather to make sacrifices on account of his children, than to avail himself of his rights for his own advantage.

It would seem, at the first glance, that the legislator need not interfere between fathers and children; that he might trust to the tenderness of the parent, and the gratitude of the child. But this superficial view would be deceptive. It is absolutely necessary, on one side, to limit the paternal power, and on the other, to maintain filial respect by legal enactments.

As a general rule, we ought to confer no power by the exercise of which the child would lose more than the father would gain.

This rule has not been followed in Prussia, where, in imitation of the Romans, there has been given to the father the right to prevent his son from marrying, without any limitation of age.

As respects the paternal authority, political writers have fallen into opposite excesses. Some have wished to make it despotic, as among the Romans; others have wished to annihilate it. Some philosophers have thought that children should not be delivered up to the caprice and ignorance of parents, but that the state ought to raise them in common; and they cite, in support of this scheme, Sparta, Crete, and the ancient Persians. It is not recollected that this education never existed, except for a small class of citizens; for in those states the mass of the population was composed of slaves.

In this artificial arrangement, there would be the difficulty of dividing the expense, and of enabling the parents to support the burden of education without deriving any advantage from it;—a burden which would weigh the heavier upon parents little influenced by motives of tenderness for

children who had become almost strangers to them. What would be a still greater inconvenience,—these children would not be seasonably formed for that diversity of pursuits which they would be called to follow. The choice of a business depends upon so many circumstances, that it belongs only to parents to fix upon it; no one else can so well judge, either what is proper for the children, what they expect, or for what their talents and inclinations are adapted. Besides, this system, which counts for nothing the reciprocal affection of fathers and children, would have a most fatal effect in destroying the family spirit, in weakening the conjugal union, in depriving fathers and mothers of the pleasure which they derive from seeing a new generation growing up around them. Would they feel the same zeal for the future happiness of children, who would no longer be theirs? Would they cherish an affection which they had no hope would ever be returned? Would industry, no longer animated by the spur of paternal love, have the same ardor? Would not domestic enjoyments take a turn less advantageous to general prosperity?

As a last reason I shall add, that the natural arrangement, which leaves the choice, the mode, and the burden of education to the parents, may be compared to a series of experiments for perfecting the general system. Every thing is advanced and developed by the emulation of individuals, and by differences of ideas and of genius; in a word, by the variety of particular impulses. But let the whole be cast into a single mould; let instruction everywhere take the form of legal authority; errors will be perpetuated, and there will be no further progress. This perhaps is saying too much in relation to an idea so chimerical; but this notion of Plato's has seduced, in our day, some celebrated authors; and an error which has misled Rousseau and Helvetius, will be likely to find other defenders.

## CHAPTER V.

*Of Marriage.*

Inde casas postquam, ac pelles, ignemque pararunt,  
 Et mulier conjuncta viro, concessit in unum,  
 Castaque privatæ veneris connubia leata,  
 Cognita sunt, prolemque ex se videre creatam,  
 Tunc genus humanum primum mollescere cœpit.

LUCRETIUS, v. 1109.

When huts, and skins, and fire, they had prepared,  
 And woman joined to man, became as one,  
 And chaste connubial joys of private love  
 Were known, and offspring from themselves they saw,  
 Then first the human race began to soften.

UNDER whatever point of view the institution of marriage is considered, nothing can be more striking than the utility of that noble contract, the tie of society, and the basis of civilization.

Marriage, considered as a contract, has drawn woman from the severest and most humiliating servitude; it has distributed the mass of the community into distinct families; it has created a domestic magistracy; it has formed citizens; it has extended the views of men to the future, through affection for the rising generation; it has multiplied social sympathies. To perceive all its benefits, it is only necessary to imagine for a moment what men would be without that institution.

The questions relating to this contract, may be reduced to seven. 1st. Between what persons shall it be permitted? 2d. What shall be its duration? 3d. What its conditions? 4th. At what age may it be contracted? 5th. At whose choice? 6th. Between how many persons? 7th. With what formalities?



## SECTION I.

*Between what persons shall marriage be permitted?*

If we are guided upon this question by historical facts, we shall encounter great embarrassment, or rather, it will be impossible to deduce any single fixed rule from so many contradictory usages. There will not be wanting respectable examples, to authorize unions which we regard as most criminal, nor for prohibiting many which we esteem quite innocent. Every people pretend to follow in this respect, what they call the law of nature; and they look with a sort of horror upon everything not conformed to the matrimonial laws of their own country. Let us suppose ourselves ignorant of all these local institutions; let us consult only the principle of utility, for the purpose of discovering among what persons it is fit to allow, or to prohibit, this union.

If we examine the interior of a family, composed of persons who differ among themselves in age, sex, and relative duties, there will be immediately presented to our minds strong reasons for prohibiting certain alliances among several individuals of it.

There is a reason which weighs directly even against the connection of marriage. A father, a grandfather, or an uncle holding the place of a father, might abuse their power by compelling a young girl to contract an alliance with them which would be odious to her. The more necessary the authority of these relatives is, the less temptation should they have to abuse it.

This inconvenience, however, extends but to a small number of the cases called incestuous, and is not the weightiest. It is the danger of dissolute manners, that is, the evil which would result from a transient commerce without marriage, that affords the true reasons for proscribing certain alliances.

If there were not an insurmountable barrier between near relatives called to live together in the greatest intimacy, this contact, continual opportunities, friendship itself and its innocent caresses, might kindle fatal passions. The family, that retreat where repose ought to be found in the bosom of order, and where the movements of the soul agitated by the scenes of the world ought to grow calm, would itself become a prey to all the inquietudes of rivalry, and to all the furies of passion. Suspicions would banish confidence; the tenderest sentiments of the heart would be quenched; eternal enmities, or vengeance, of which the bare idea is fearful, would take their place. The belief in the chastity of young girls, that powerful attraction to marriage, would have no foundation to rest upon; and the most dangerous snares would be spread for youth, in the very asylum where it could least escape them.

These inconveniences may be arranged under four heads:

1st. *Evil of rivalry*; the danger resulting from a real or suspected rivalry between a married person and certain relatives or connections.

2d. *Prevention of marriage*; the danger of depriving girls of the chance of forming a permanent and advantageous establishment in the way of marriage, by diminishing the confidence of those who might desire to marry them.

3d. *Relaxation of domestic discipline*; the danger of inverting the nature of the relations between those who ought to command and those who ought to obey; or at least, of weakening that tutelary authority, which for the interest of minors, ought to be exercised over them by the heads of the family, or those who hold their place.

4th. *Physical injury*; those dangers to the health and strength which might result from premature indulgences.

*Table of prohibited Alliances.*

A man shall not marry,

1. The wife or widow of his father, or of any other progenitor. *Inconveniences*, 1, 3, 4.
2. Any descendant. *Incon.* 2, 3, 4.
3. His aunt. *Incon.* 2, 3, 4.
4. The wife or widow of his uncle. *Incon.* 1, 3, 4.
5. His niece. *Incon.* 2, 3, 4.
6. His sister. *Incon.* 2, 4.
7. Any descendant of his wife. *Incon.* 1, 2, 3, 4.
8. His wife's mother. *Incon.* 1.
9. The wife or widow of any descendant. *Incon.* 1.
10. The daughter of his father's wife by a former husband, or of his mother's husband by a former wife. *Incon.* 2, 4.

In a code of laws, there would be necessary a corresponding table of alliances forbidden to the woman; here it would be a useless repetition.

Shall a man be allowed to marry the sister of his deceased wife?

There are reasons for and against it. The reason against it is, the danger of rivalry between the sisters; the reason for it is, the advantage of the children. If their mother dies, what an advantage to them to have their own aunt for a step-mother! What more likely to diminish the natural hostility of that connection than so near a relationship? This last reason seems to be the weightier; but to obviate the danger of rivalry, the wife ought to have the legal power of forbidding the house to her sister. If the wife does not choose to have her own sister in the house, what lawful motive can the husband have for desiring it?

Shall a man be allowed to marry his brother's widow? There are reasons for and against it, as before. The reason against it, is still the danger of rivalry; the reason for it, is

likewise the advantage of the children. But both these reasons seem to have very little weight.

My brother has no more authority over my wife, than a stranger, and cannot see her but with my permission. The danger of rivalry on his part, seems as small as on that of any other person. The reason *against*, is reduced almost to nothing. On the other hand, children have little to fear from a father-in-law. If a step-mother is not the enemy of the children-in-law, it is very remarkable; but a step-father is commonly their friend, their second guardian. The differences in the condition of the two sexes, the legal subjection of the one, the legal empire of the other, expose them to opposite weaknesses, which produce opposite effects. The uncle is already the natural friend of his nephews and his nieces. They have nothing to gain in that respect by his becoming the husband of their mother. If they find an enemy in a step-father who is a stranger, the protection of their uncle is always a resource. If they find a friend in such a step-father they have acquired an additional protector whom they would not have had, if their uncle had married their mother. The reasons for, and the reasons against, having little force on either side, it would seem that the good of liberty ought to incline the balance in favor of permitting such marriages.

Instead of the reasons which I have given for prohibiting alliances within a certain degree of relationship, ordinary morals decide peremptorily upon all these points of legislation, without taking the trouble to examine any of them. "Nature," it is said, "is repugnant to such alliances; therefore they are forbidden."

This argument alone never can furnish a satisfactory reason for prohibiting any action whatever. If the repugnance be real, the law is useless. Why forbid what nobody wishes to do? If in fact there be no repugnance, the reason is at an end; vulgar morality would have nothing more to

say in favor of prohibiting the acts in question, since its whole argument founded upon natural disgust, is overturned by the contrary supposition. If everything is to be referred to nature, that is, the bent of desire, we must equally conform to her decisions, whatever they may be. If those alliances must be forbidden to which she is repugnant, those with which she is pleased, must be permitted. Nature which hates, merits no more regard than nature which loves and desires.

It is very rare that the passion of love is developed within the circle of individuals, to whom marriage ought to be forbidden. There needs to give birth to that sentiment, a certain degree of surprise, a sudden effect of novelty. It is this which the poets have happily expressed by the ingenious allegory of the arrows, quiver and blinded eyes of love. Individuals accustomed to see each other and to know each other, from an age which is neither capable of conceiving the desire, nor of inspiring it, will see each other with the same eyes to the end of life; and this inclination finds no determinate epoch whence to begin. Their affections have taken another course, like a river which has dug its bed, and which does not change it.

Nature then agrees sufficiently well with the principle of utility. However, it will not do to trust to nature alone. There are circumstances in which the inclination may spring up, and in which an alliance will become an object of desire, if it is not prohibited by the laws, and branded by public opinion.

Under the Greek dynasty of Egyptian sovereigns, the heir of the throne commonly married one of his own sisters. It was, apparently, to escape the danger of an alliance either with a subject, or a foreign family. In that rank, such marriages might be exempt from the inconveniences that would attend them in private life. Royal opulence

would admit a separation and a seclusion, which could not be maintained in the dwelling of a citizen.

Policy has produced some similar examples in modern times. In our day, the kingdom of Portugal has introduced a practice not far distant from that of Egypt; a reigning queen has had a nephew and a subject for her husband. But to escape the blot of incest, kings and the great can address themselves to an experienced chemist, who changes at his pleasure the color of certain actions. Protestants, to whom this laboratory is closed, have no power to marry their aunts. The Lutherans however, have given the example of a similar extension of privileges.

The inconvenience of these alliances is not for the persons who contract them. The evil is wholly in the example. A permission granted to some, makes others feel the prohibition as a tyranny. When the yoke is not the same for all, it weighs the heavier upon those who wear it.

It has been said that these intermarriages of the same blood, cause the species to degenerate, and that the necessity of crossing the races is as great among men as among other animals. There might be some force in this objection, if it were likely that alliances among relations, if not prohibited by law, would become the most common. But it is enough to show the futility of bad reasons; indeed it would be too much,—were it not an essential service to a good cause, to put aside the false and feeble arguments by which it is attempted to sustain it. Some well-intentioned men are of opinion that no support to good morals, not even a false one, ought to be taken away. This error is the same as that of those devotees, who have thought to serve religion by pious frauds. Instead of fortifying it, they have weakened it, by exposing it to the derision of its adversaries. When a depraved mind has refuted a false argument, it claims that refutation as a triumph over morality itself.

## SECTION II.

*For what time? Considerations on Divorce.*

If the law did not prescribe any particular duration to this contract, if individuals were allowed to form this engagement like any other, for a longer or shorter term, what under the auspices of liberty would be the most common arrangement? Would it be very different from the order now established?

The end of the man in this contract, might be only the gratification of a transient passion, and that passion satisfied, he would have had all the advantage of the union without any of its inconveniences. It is not the same with the woman; the engagement has for her, very durable and very burdensome consequences. After the troubles of pregnancy, after the pains of child-birth, she is charged with the cares of maternity. Thus a union which would give the man nothing but pleasures, would be for the woman the beginning of sufferings, and would lead her to inevitable destruction, if she had not secured beforehand for herself, and for the germ which she nourishes in her bosom, the care and the protection of an husband. "I give myself up to you," she says, "but you shall be my guardian in my state of weakness, and you shall provide for the fruit of our love." Here is the beginning of a partnership, which would prolong itself through many years, though there were but one child; but successive births form successive ties; as time advances, the engagement is prolonged; the bounds first assigned to it presently disappear, and meanwhile there is opened a new course of reciprocal pleasures and duties.

When the mother can expect no more children, when the father has made provision for the support of the youngest of the family, can we suppose that the union will be severed? After a cohabitation of so many years, will the parties think

of separating? Will not habit have entwined their hearts by a thousand and a thousand ties, which death only can sever? Will not the children form a new centre of union? Will they not create a new fund of pleasures and of hopes? Will they not render the father and mother necessary to each other, by the cares and the charms of a common affection which no one else can share with them? It seems then that the ordinary course of the conjugal union would be, for life; and if it is natural to suppose in the woman prudence enough thus to secure her dearest interests, can we expect less of a father or a guardian, whose experience is more mature?

The woman has yet an additional interest in the indefinite duration of the union. Time, pregnancy, nursing, cohabitation itself, all conspire to diminish the effect of her charms; and she must expect that her beauty will decline at an age when the energy of the man is still increasing. She knows that having worn out her youth with one husband, she will hardly find another; while the man will experience no such difficulty. Accordingly, foresight will dictate to her this new clause in the agreement: "If I give myself up to you, you shall not be free to leave me without my consent." The man in his turn demands the same promise; and thus on both sides is completed a lawful contract founded upon the happiness of the parties.

It seems then that marriage for life is the most natural marriage, the best adapted to the wants and the circumstances of families, and in general, the most favorable to individuals. If there were no laws to ordain it, that is, no laws except those which sanction contracts in general, this arrangement would always be the most common, because it is best adapted to the reciprocal interests of the parties. Love on the part of the man; love and foresight on the part of the woman; the enlightened prudence and affection of



parents,—all conspire to imprint the character of perpetuity upon this alliance.

But what shall we think if the woman adds this clause: "We shall not be at liberty to separate; though hereafter we come to hate each other—as now we love?" Such a condition would seem an act of folly; it has something about it contradictory and absurd which shocks at the first glance; everybody would agree in regarding such a promise as rash, and in thinking that humanity requires it to be omitted.

But it is not the woman who asks, it is not the man who invokes this absurd and cruel clause; it is the law, which imposes it on both, as a condition which cannot be avoided. The law comes in between the contractors; it takes them by surprise, in the midst of youthful transports, in those moments which open all the perspective of happiness, and it says to them, "You form this connection in the hope of enjoyment, but I warn you, you are entering a prison of which the gate will never open. I shall be inexorable to the cries of your grief, and though you wound each other with your chains, I cannot suffer them ever to be loosened."

To believe in the perfection of the object beloved, to believe in the eternity of a passion felt and inspired, these are illusions which we may well pardon in two children blinded by love. But ancient lawyers, and legislators gray with age, do not yield themselves up to such chimeras. If they believe in this eternity of passion, why do they take away a power which nobody would use? But no; they foresee inconstancy, they foresee hatred; they foresee that the most violent love may be succeeded by more violent antipathy; and with the cold-blooded indifference of careless unconcern, they pronounce the eternity of the marriage vow, even though the sentiments in which it originated shall be followed by feelings entirely the reverse. If there were a law which forbade the taking a partner, a guardian,

a manager, a companion, except on the condition of always keeping him, what tyranny, what madness, it would be called! Yet a husband is a companion, a guardian, a manager, a partner, and more yet; and still, in the greater part of civilized countries, a husband cannot be had except for life.

To live under the perpetual authority of a man you hate, is of itself a state of slavery; but to be compelled to submit to his embraces, is a misfortune too great even for slavery itself. Is it said that the yoke is mutual? That only doubles the misfortune.

Since marriage presents to the generality of men the only means of satisfying fully and peaceably the imperious desires of love, to turn them from it is to deprive them of its pleasures, and is to do an evil of no small magnitude. Now what more terrible bugbear than the indissolubility of this contract? Whether it be a marriage, a service, a country, a condition of any kind, the prohibition to go out of it must operate as a prohibition to enter in.

It is enough just to indicate another observation, well founded, but common. As marriages are more rare, infidelity to the marriage bed is more frequent; the more seducers, the more seductions.

When death is the only deliverer, what horrible temptations, what crimes may result from a position so fatal! The examples which remain unknown, are perhaps more numerous than those which come to light. What most commonly takes place upon these occasions is, *negative offence*. How easy is crime, even to unperverted hearts, where nothing but inaction is needed to accomplish it! Expose a detested wife and a beloved mistress to a common peril; will efforts as generous and as sincere be made for the one as for the other?

It must not be dissembled that there are objections against

the dissolubility of marriages ; which I now proceed to state, and to answer.

*First objection.* If divorce were allowed, neither party would regard their lot as irrevocably fixed. The husband would look round to find some woman who pleased him better ; the wife, in like manner, would be employed upon comparisons and projects to procure a better husband. There would result a perpetual and mutual insecurity in this important state, on which every plan of life depends.

*Answer.* 1st. This same inconvenience exists in part, under other names, during an indissoluble marriage, whenever, according to the supposition, affection is extinguished. In that case, it is not a new wife that is sought for, but a mistress ; it is not a second husband, but a lover. The strict duties of marriage, and its prohibitions so easily eluded, rather serve to produce inconstancy than to prevent it. It is well known that prohibition and constraint are a stimulus to the passions. Is it not a truth of experience, that even obstacles, by occupying the imagination, and by recalling the mind to the same object, serve only to increase the desire of surmounting them ? The rule of liberty would produce fewer stray fancies than the law of conjugal captivity. Render marriages dissoluble, and there would be more apparent separations, but fewer real ones.

2d. We should not confine ourselves to a consideration of the evil of the thing ; we must look also at its advantages. Both parties knowing what they might lose, would cultivate those means of pleasing from which their mutual affection originated. They would take more pains to study and to humor each other's disposition. They would perceive the necessity of making some sacrifices of inclination and self-love. In one word, care, attention, complaisance, would be prolonged after marriage ; and what is now done only to gain affection, would then be practised to preserve it.

3d. Young persons about to be married would not be so

often sacrificed by the avarice and the cupidity of their parents. It would be necessary to give some attention to inclinations, before forming a union which repugnance might break. That real suitability upon which happiness depends,—correspondence of age, of education and of taste,—would then enter into the calculations even of prudence. It would no longer be possible to marry property without marrying the owner of it. Before forming an establishment, some attention would be paid to secure its durability.

*Second objection.* Each party, regarding the connection as transitory, would espouse with indifference the interests, especially the pecuniary interests, of the other. Hence, profusion, negligence, and bad economy of every kind.

*Answer.* There is the same danger in partnerships of commerce, yet the evil is very rarely felt. A dissoluble marriage has one tie which such partnerships have not,—the strongest, the most durable of all moral ties,—an affection for their common children, which cements the affection of the married couple. We see this bad economy, attendant upon an indissoluble marriage, much oftener than on a partnership of commerce. Why? It is the effect of indifference and disgust, which produces in married people who are tired of each other, a continual need of separation, and of something to distract their attention. The moral tie of the children is dissolved. Their education, the care of their future happiness, is hardly a secondary object; the charm of common interest vanishes; each, engaged in a separate pursuit of pleasure, cares little what may happen to the other. This principle of disunion introduces a thousand kinds of negligence and disorder into their affairs; and the ruin of their fortune is very often a consequence of the estrangement of their hearts. Under the reign of liberty, this evil would not exist. Before disuniting their interests, disgust would have separated their persons.

Facility of divorce tends rather to prevent prodigality

than to produce it. Each would be careful of giving so all-sufficient a ground of discontent to an associate, whose esteem it would be necessary to conciliate. Economy estimated at all its worth by the interested prudence of both parties, would always be so great a merit in their eyes, that it would cover a multitude of faults, and many wrongs would be forgiven for its sake. Moreover, it would be very evident, that in case of a divorce, that party who had gained the reputation of misconduct and prodigality, would have much less chance of forming a new and advantageous connection.

*Third objection.* The dissolubility of marriage would produce in the stronger party a disposition to mal-treat the feebler, in order to force consent to a divorce.

*Answer.* This objection is solid ; it merits the greatest attention on the part of the legislator. Fortunately, a single precaution will be sufficient to diminish the danger. In case of bad treatment, the party ill-treated should alone be set at liberty. Thenceforth, the more desirous a husband might be of a divorce for the sake of a subsequent marriage, the more fearful he would be of ill conduct towards his wife, lest such actions might be construed as violence intended to force her consent. Gross and brutal means being prohibited, attractive means would be his only resource for persuading her to a separation. He would tempt her, if he had the means, by the offer of an independent provision ; or he would find another husband for her, as the price of his ransom.

*Fourth objection.* What would become of the children after the law had dissolved the union between their father and mother ?

*Answer.* What would become of them if death had dissolved it ? In the case of divorce the disadvantage to which they are subjected, is not so great. The children may continue to live with that parent whose cares are most necessary

to them ; for the law consulting their interest, will confide the boys to the father, and the girls to the mother. The great danger of children after the decease of a parent is, that of passing under the control of a step-father or of a step-mother, who may look upon them with hostile eyes. Girls are especially exposed to the most vexatious treatment under the habitual despotism of a second mother. In the case of divorce, this danger does not exist. The boys will have their father to educate them, the girls will have their mother. Their education will suffer less than it would have done from domestic discords and hatred. If the interests of the children would justify the prohibition of second marriages in case of divorce, for a much stronger reason might the same prohibition be justified in the case of death.

The dissolution of a marriage is an act sufficiently important to be submitted to formalities which would have the effect more or less to counteract the operation of caprice, and to leave the parties time for reflection. The intervention of a magistrate is necessary not only to establish the fact that there has been no violence on the part of the husband to force the wife's consent ; but also to interpose a delay, longer or shorter, between demanding and obtaining the divorce.

This is one of those questions upon which opinions will always be divided. Every person is inclined to approve or to condemn divorce according to the good or the evil which he may have seen to result from certain particular cases, or according to his own personal interest.

In England a marriage can be dissolved only when the adultery of the wife is proved. But it is necessary to pass through many tribunals, and as an act of parliament on this subject costs at least five hundred pounds sterling, divorce is accessible only to a very limited class.

In Scotland, the adultery of the husband is enough to found a divorce upon. In this respect the law exhibits a

certain degree of facility; yet it is not destitute of rigor. While it dissolves the marriage, it prohibits the guilty party from contracting another with the accomplice of his offence.

In Sweden divorce is allowed for adultery on either side, which there amounts to the same thing as permitting it by mutual consent; for the husband suffers himself to be accused of adultery, and the marriage is dissolved.

In Denmark it is the same, provided collusion cannot be proved.

Under the code Frederic, the parties can separate at pleasure, and marry again after a year's solitude. It would seem that some part of this interval would be better employed in delaying the divorce.

At Geneva, adultery is a ground of divorce; but it may also take place for mere incompatibility of character. A woman by leaving her husband's house, and retiring among her friends or relations, gives him occasion to ask a divorce, which demand, if persisted in, always has its legal effect. Divorce is rare. It is proclaimed in all the churches; and that proclamation is a sort of punishment or public censure always dreaded.

After marriage, in France, was made dissoluble at the pleasure of the parties, in two years there took place at Paris, out of all the marriages in that city, between five and six hundred divorces. But it is very difficult to judge of the real effects of an institution so new.

Divorces are not common in those countries where they have been a long time permitted. The same reasons which prevent legislators from permitting them, deter individuals from availing themselves of the permission. The government which prohibits them decides, by so doing, that it understands the interests of individuals better than they do themselves. If such a law has any effect at all, it must be a bad one.

In all civilized countries, the woman who has experienced cruelties and bad treatment on the part of her husband, has obtained from the tribunals what is called a *separation*; but this is not attended by a liberty to either party of marrying again. The ascetic principle, hostile to pleasure, has only consented to the assuagement of suffering. The outraged woman and her tyrant undergo the same lot; but this apparent equality covers an inequality too real. Opinion leaves a great freedom to the man, while it imposes the strictest restraints upon the woman.

### SECTION III.

#### *On what conditions?*

The only question here is, to discover those general conditions of marriage which, according to the principles of utility, suit the greatest number best; for it ought to be left to the persons interested to fix upon the particular stipulations of their contract; or in other words, the conditions ought to be left to their will, with some general exceptions.

First condition. *The wife shall be subject to the will of the husband, reserving an appeal to the courts of justice.* There may, at any moment, arise a contradiction between the wills of two persons who pass their lives together. The good of peace requires that a pre-eminence should be established which may prevent or end these contests. But why should the man govern? Because he is the stronger. In his hands, the power maintains itself. Give the authority to the woman, and every moment a revolt would break out on the part of her husband. This reason is not the only one. It is probable that the man, by his kind of life, has acquired more experience, more aptitude for affairs, more steadiness of mind. In these respects there are exceptions; but there are exceptions to every general rule.



I have said, *reserving an appeal to the courts of justice.* For it is not our object to make the man a tyrant, and to reduce to a passive state of slavery the sex which by its feebleness and its tenderness, most needs the protection of the laws. The interests of women have been too often sacrificed. By the Roman law, the rules of marriage are a code of violence; the man receives the lion's share. But those, on the other hand, who out of some vague notion of justice and generosity, wish to give to the woman an absolute equality, only spread for her a dangerous snare. To absolve her by law, as far as possible, from the necessity of pleasing her husband, would operate to weaken her empire instead of strengthening it.

Man, assured of his prerogative, is not disturbed by the inquietudes of jealousy, and enjoys it while he yields it. Substitute for this arrangement, a rivalry of powers; the pride of the stronger would be continually wounded, it would convert him into a dangerous antagonist; and looking more at what was taken from him than at what was left, he would turn all his efforts towards re-establishing his pre-eminence.

Second condition. *The control of the affairs of the family shall rest with the man alone.* This is the natural and immediate consequence of his authority. Besides, it is commonly upon his labor that the support of the family depends.

Third condition. *Property shall be enjoyed in common.* The reasons are, first, the good of equality; second, the benefit of giving both parties the same interest in the domestic prosperity. But this condition is necessarily modified by the fundamental rule which submits the wife to the power of the husband. Differences in the mode of life and in the nature of property will require a great many details; but this is not the place to give them.

Fourth condition. *The wife shall observe conjugal fidelity.*

The reasons why adultery should be made an offence will be given in the Penal Code.

Fifth condition. *The husband shall observe the same conjugal fidelity.* The reasons for punishing adultery on the man's part, are far less cogent. Still they are strong enough to justify this legal condition. They will be explained in the Penal Code.

#### SECTION IV.

##### *At what age?*

At what age shall marriage be permitted? It ought never to be allowed before the age at which the contracting parties are supposed to know the extent of the engagement; and this requisition ought to be still more strict in countries where the marriage is indissoluble. What precautions are not necessary to prevent a rash engagement in a case in which repentance will be useless? Surely, in such a case, this right of contracting a marriage ought not to be allowed at an age earlier than that at which the individual is entrusted with the management of his property. It is absurd that a man should be able to dispose of himself for life, at an age when he cannot sell a piece of land of the value of ten crowns.

#### SECTION V.

##### *At whose choice?*

On whom shall the choice of a husband or a wife depend? This question presents an apparent, or rather, a real absurdity; as though such a choice could possibly belong to any other than the parties interested.

The law should never trust this power to fathers. They lack two things essential to its exercise: the knowledge

requisite for such a choice, and a will directed to the true end. Parents and children neither see nor feel alike. They have not the same interest. Love is the motive of the young; and for that, old men care but little. In general, fortune is a trifling consideration with the children; it absorbs all the father's thoughts. The son wishes to be happy; the father wishes him to seem so. The son is ready to sacrifice every interest to that of love; the father wishes that interest to be subordinate to every other.

For a father to receive into his family a son-in-law or a daughter-in-law whom he dislikes, is a vexatious circumstance; but is it not more cruel that the child should be deprived of a companion who would make him happy? Is the pain of the father equal to that of the child? Compare the probable duration of the father's life with that of the son, and consider if you ought to sacrifice that which is beginning, to that which is ending. Such is the objection to the mere right of preventing a marriage. How much stronger would it be, if a pitiless tyrant might abuse the tenderness and the timidity of his daughter, and force her to marry a husband whom she hated?

The attachments of children depend very much upon their fathers and mothers. This is partly true of the sons, and almost wholly so of the daughters. If the parents neglect to use this right, if they do not apply themselves to direct the inclinations of their children, if they abandon to chance the choice of their acquaintances, whom ought they to blame for the imprudences of youth?

But in taking from the parents the power to restrain and to compel, there is no need to take from them the power of moderating and retarding. The marriageable age may be divided into two epochs. During the first, the want of consent on the part of the parents should be enough to prevent the marriage; during the second, they might still have the power of retarding for some months the celebration of the

contract. This time might be allowed the parents to try what they could do in the way of advice.

There exists a very singular custom in a country of Europe celebrated for the wisdom of its institutions. The consent of the father is necessary to a minor,—unless the lovers can run a hundred leagues before being caught. But if they are so lucky as to arrive in a certain village, and to procure at the moment some passer-by to pronounce a nuptial benediction, without any questions asked or answered, the marriage is valid, and the father is ousted of his authority. Has this privilege been left in existence for the encouragement of fortune-hunters? Or is there a secret desire of weakening the paternal power, and of favoring what are elsewhere called *mis-alliances*?

## SECTION VI.

### *How many parties to the contract?*

Between how many persons may this contract of marriage subsist at the same time? In other terms, ought polygamy to be tolerated? Polygamy is simple or complex. Simple polygamy is *polygyny*, multiplicity of wives, or *polyandria*, multiplicity of husbands.

Is polygyny useful or hurtful? All that anybody has been able to say in its favor, relates to certain particular cases, to certain transient circumstances, as when a man, by his wife's sickness, is deprived of the pleasures of marriage, or when by his employment he is obliged to divide his time between two houses.

That polygyny might sometimes be agreeable to a man, is likely; but it never would be so to the women. For every man favored by it, the interests of two women would be sacrificed.

1st. The effect of such a license would aggravate the inequality of conditions. Superiority of wealth has too

great an ascendancy already ; and such an institution would increase it. A rich man negotiating with a poor girl, would avail himself of his position to secure the right to give her a rival. Each of his wives would find herself reduced to half a husband, when she might have made happy another man, who in consequence of this unjust arrangement is deprived of a companion.

2d. Where would be the peace of families? The jealousies of rival wives would spread among their children. They would form two opposite parties, two little armies, each having at its head a protectress equally powerful, at least, so far as rights were concerned. What a scene of contentions! what fury! what animosity! From the enfeeblement of paternal ties would result a like enfeeblement of filial respect. Each son would see in his father the protector of his enemy ; all his acts of kindness or of severity, interpreted by opposite prejudices, would be attributed to unjust sentiments of favor or of hatred. The education of the children would be wretched, in the midst of these hostile passions, under a system of favor or oppression, which would spoil some by rigor, and others by indulgence. In the East, polygamy may be consistent with peace ; but it is slavery that prevents discord ; one abuse palliates another ; all are tranquil under the same yoke.

There would result from polygyny an increase of the husband's authority. What zeal to satisfy him! What delight at anticipating a rival in an act pleasing to the husband! Would this be an evil or a good? Those persons, who out of a mean opinion of women, think they cannot be too submissive, find polygyny admirable. Those who think that the ascendancy of the sex is favorable to refinement of manners, that it augments all the pleasures of society, that the mild and persuasive authority of women is salutary in the family, must esteem polygyny a great evil.

It is not necessary seriously to discuss either polyandria, or complex polygamy. Too much has been said even on polygyny, were it not necessary to point out the true basis upon which manners rest.

## SECTION VII.

### *With what formalities?*

The formalities of the marriage contract ought to have two objects in view:—1st. To establish the fact of the free consent of the parties, and of the lawfulness of their union. 2d. To make known the marriage, and to secure proofs of its celebration. It is proper, besides, to explain to the contracting parties the legal rights which they respectively acquire, and the legal obligations they assume.

Most nations have made this act very solemn; and without doubt ceremonies which strike the imagination, serve to impress upon the mind the force and dignity of the contract.

In Scotland, the law far too accommodating, exacts no formality whatever. A mutual declaration of marriage, in the presence of a witness, is enough to render the contract valid; and therefore it is, that English minors, impatient of restraint, hasten to relieve themselves, by an off-hand marriage, at a village on the Scotch frontier, called *Gretna-Green*.

In establishing the forms of marriage there are two dangers to be avoided:—1st. That of rendering them so embarrassing as to prevent marriage, when there is wanting neither freedom of consent, nor capacity to contract. 2d. That of giving to the persons who are required to be present at the formalities, the power of abusing that right, and of employing it to some bad end.

In many countries, one must watch a long time in the

vestibule of the temple, before arriving at the altar. Under the name of an *affiance*, the chains of marriage are worn, without its enjoyments. For what serves this preliminary, except to multiply embarrassment, and to spread snares? The code Frederic is loaded, in this respect, with useless restraints. The English law, on the other hand, is remarkable for its simplicity and clearness. By the English law, the parties know what they are about; they are married, or they are not married; there is no intermediate condition.









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